

Distinction between absolute and strict liability offences law essay



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In general, the criminal liability requires the proof of both actus reus and mens rea before convicting a person. When the necessity for the prosecution to prove mens rea (in the sense of intention, knowledge or recklessness) regarding the actus reus elements of the offence is disregarded, either expressly or impliedly, the offence in question is described as strict or absolute liability offence.

What is the distinction (if any) between absolute and strict liability offences?

The distinction can be seen by what the prosecution must prove

Strict liability offences do not require proof of mens rea in respect of at least one element of the actus reus, usually the essential element. However, proof of mens rea may be required for some of the elements of the actus reus.

Absolute liability offences do not require proof of any mens rea element, but are satisfied by proof of the actus reus alone.

The distinction can be seen by examining the issue of causation

In strict liability, the prosecution is required to prove the causation of the actus reus and the offence. In *Empress Car Co (Abertillery) Ltd* [1], the lordship said that, 'While liability [for water pollution] is strict and therefore includes liability for certain deliberate acts of third parties ... it is not an absolute liability in the sense that all that has to be shown is that the polluting matter escaped from the defendant's land, irrespective of how this happened. It must still be possible to say that the defendant caused the pollution'.

In absolute liability, however, a crime may not require any causation link at all, if the specified 'state of affairs' exists. In *Winzar* [2], the defendant was

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removed from a hospital by police and was then arrested and found guilty of being drunk on the highway, even though the police officers had put him there. The court held that it was enough to show that D had been present on the highway and was perceived to be drunk. It didn't matter that his presence on the highway was momentary and involuntary.

The distinction can be seen by what defences are available to the defendant

Many academic papers differentiate strict and absolute liability by the availability of the defence of honest but mistaken belief, which is a common law defence. Where it is available the liability is strict, where it is not available the liability is absolute.

The situation becomes complex in case where defence are provided in the statute for the defendant to escape liability. If common law defence is held by court to be excluded from the offence, does the provision of statutory defence disqualify an offence from being absolute?

In the case HKSAR v So Wai Lun [3] , the court of appeal has the opportunity to look into the case B (A Minor) v DPP [4] , and made the following observation.

“ Section 5 of the Sexual Offences Act 1956 made it an offence for a person to have unlawful sexual intercourse with a girl under 13 while section 6 made it an offence in relation to girls under 16. Under section 6, a defence was expressly set out where the defendant, provided he was under the age of 24, believed the girl to be 16 or over... Lord Steyn said ...since section 5 contained no such defence, it “ plainly” created an offence of absolute liability”. So the court is suggesting that unlawful underage sexual

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intercourse, a traditional example of absolute liability, will not be considered as absolute liability per se in the presence of statutory defence in provision.

This observation is reaffirmed in the recent case *Hin Lin Yee v HKSAR* [5] by Ribeiro PJ in paragraph 198 (ii) and (iii).

In other jurisdiction like Australia, the definition of absolute liability is even more blurred by the fact that common law defence like duress and self defence are available for absolute liability.

How does one determine if an offence is one of strict or absolute liability?

The question of whether a statutory offence requires proof of mens rea or is strict liability is treated as a matter of statutory construction, the statutory provision enacting the offence must be construed to determine the legislative intention. In *Gammon (Hong Kong) Ltd* [6], the Lordship has summarized the approach to the interpretation:

There is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence.

The presumption is particularly strong where the offence is “truly criminal” in character.

“Truly criminal” offence usually refers to those dealing with violence against persons or property. The presumption is particularly strong due to the stigma attached to the offence.

The presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute.

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Sometimes the offence will expressly specify the type or level of mental fault by using words such as willfully, recklessly, carelessly, etc. In such cases, the court must then go on to define the precise meaning of those mens rea words.

Where a statute is “ silent” as to the mens rea for an offence, the courts must decide as a matter of general principle or statutory interpretation what level or type of mens rea applies.

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 as issue.

Strict liability has often been imposed in regulatory offences concerning “ social concern” and “ public safety”, such as licensing, pollution, health and safety, driving offences, environmental offences and public health offences.

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.

In *Lim Chin Aik v R* [7] , the defendant had been convicted under the immigration laws of Singapore by remaining there (after entry) when he had been prohibited of entering. The aim of the law was to prevent illegal immigration. The defendant had no knowledge of the prohibition order and there was no evidence that the authorities had attempted to bring the prohibition order to his notice. Since there was nothing D could have done to

determine whether a order had been made against him and thus ensure compliance with the relevant legislation, the Privy Council ordered that the offence was not one of strict liability because it did nothing to promote enforcement of the law.

What policies are behind the creation of absolute and strict liability?

It is said that the imposition of strict liability encourages greater observance of and compliance with law, especially to the employer who is vicariously liable to employee's act, and this is particularly important where matters of public safety, public health and public welfare are concerned. High standards can be achieved and maintained only if those conducting activities involving risks to safety, health, the environment and so on are made to feel that it is not enough just to take reasonable care; they must take all possible care. Secondly, it is said that strict liability, by relieving the prosecution of the task of investigating and proving mens rea against an alleged offender, enhances the efficiency of our administrative and judicial systems.

How do the concepts of absolute and strict liability assist or hinder the Prosecution, the Accused and the Court in a criminal trial?

Prosecutor

It relieves the prosecutor of the virtual impossibility of proving intent or knowledge of the wrongful conduct, particularly where the defendant was a company rather than an individual. No significant hindrance is observed for prosecution in regard to the application of concept.

Accused

Strict liability draw a clear line between legality and illegality, which may reduce the information cost for the accused to determine whether himself is guilty or not in some minor offence (e. g. speeding). Unnecessary legal fee may also be saved in this regard.

On the other hand, the concept imposes liability on accused who have taken all possible steps to prevent the offence being committed and should not be blameworthy. The onus of proof is also reversed to the defendant side.

Court

The concept allows the court to strike down the many bogus defense that would otherwise succeed if excusable ignorance or mistake were always accepted as defense.

On the other hand, the courts need to engage in time consuming debates about whether the legislature intended strict or absolute liability to apply. The difficulties in identifying strict liability offences can be seen from lack of clarity in judgements. Also, the court often need to justify the creation of strict liability does not per se contravene with the Bill of Rights. [8]

Conclusion

Overall I feel that strict liability is necessary, but that it should be used wisely and that statutes should be extremely carefully worded. Other jurisdiction is slowly moving away from creating new offences of strict liability and phasing out some of the older ones, or at least revising the statute and adding possible defences. Hong Kong should also revisit the issue and see if any improvement can be made.

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