REQUIREMENT OF FAULT IN STRICT LIABILITY

Offences of strict liability are, despite its proliferation in number,[1] commonly regarded as an exception to the general rule that proof of *mens rea* is a prerequisite to criminal liability. Its acceptance in Singapore is twice anomalous given the structure of the Penal Code ("the Code"),[2] which does not provide for the continued reception of common law principles including those on strict liability,[3] and that many of the defences found in Chapter IV of the Code ("General Exceptions") provide that there can be no criminal liability without proof of some form of guilty mind.[4] The provisions of Chapter IV apply to both offences found within the Code as well as those without,[5] unless excluded by statute.[6]

The state of the law in Singapore is further complicated by the fact that, just as in England, no clear or consistent principles can be deciphered for imposing strict liability. The courts normally resort to labeling an offence as a "public welfare" offence or being "quasi-criminal" in justifying the use of strict liability, but this serves to obfuscate rather than to explain. Other proposed rationales involve fostering greater vigilance and care amongst the public and the difficulties of proof otherwise. However, if these utilitarian goals are to be taken seriously, it threatens to supplant the basic premise that criminal liability may only be imposed where a person commits a prohibited act or causes a forbidden harm and his actions are accompanied by a blameworthy state of mind.[7] The conflicting local cases and the apparent ability of judges to choose whether to impose

1 A Canadian study in 1974 found that 91% or 37,967 offences in any Canadian province may be classified as offences of strict liability, PJ Fitzgerald, T Elton, "The Size of the Problem" in *Studies on Strict Liability* (Law Reform Commission of Canada, 1974) pp 56, 61.

2 Cap 224, 1985 Rev Ed.

3 S 2 Penal Code (Cap 224, 1985 Rev Ed) provides:

> Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he is guilty within Singapore.

Cf s 5 Criminal Procedure Code (Cap 68, 1985 Rev Ed).

4 *Eg* ss 79 (Mistake of fact); 80 (Accident); 83 (Infancy); 84 (Unsoundness of mind); 85(2), 86 (Intoxication). The defence most relevant to our discussion is mistake of fact.

5 Ss 6, 40(2) Penal Code (Cap 224, 1985 Rev Ed).

6 This principle has been applied inconsistently not only in Singapore but also in India: see V Balasubrahmanyam, "The Guilty Mind" in *Essays on the Indian Penal Code* (1962) where he commented, "It is a tragedy that some times the Indian Penal Code is called to bear the oppressive weight of English case law". In Ceylon (now Sri Lanka), the Supreme Court had come down firmly on the side that the general exceptions found in Chapter IV of the Ceylon Penal Code (which is *in pari materia* with the Singapore Penal Code) apply to all statutory offences, *Perera* v *Munaweera* (1955) 56 NLR 433.

7 Koh, Clarkson, Morgan, *Criminal Law in Singapore and Malaysia* (1989) p 35.

strict liability or not as they please suggest that the approach is nothing more than one of expediency. This has led one local commentator to remark:

> It seems almost that for every case in which the courts here have opted for *mens rea* another case on the same or similar offence can be found in which liability has been held to be strict, and *vice-versa*.[8]

The *coup de grâce* for the case for strict liability must surely be that it is unnecessarily blunt. It fails to distinguish between those who acted with all reasonable care in avoiding the proscribed act or omission from those who did not. Punishing the first group of persons can have little effect in preventing other persons in the future from committing the similar offence. Thus, it has been proposed that in order to carry out the object of the statute in creating the offence satisfactorily,[9] it is sufficient to impose liability based on proof of negligence.[10] In *R* v *City of Sault Ste Marie*, Dixon J, as he then was, questioned:

> [The argument for imposing liability without fault] rests upon assumptions which have not been, and cannot be empirically established. There is no evidence that a higher standard of care results .... If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of a breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked.[11]

In view of the above criticisms, it is not surprising to find alternatives being suggested. The term "halfway house" has been used to describe the various possible alternatives.[12] Locally, Michael Hor has also called on the courts to devise a "revitalised common law" in picking the degree

8 Bron McKillop, "Strict Liability Offences in Singapore and Malaysia" (1967) 9 Mal LR 118, 144. See also Michael Hor Yew Meng, "Strict Liability in Criminal Law: A Re-Examination" [1996] SJLS 312, 321 where he writes, "It would not be overstating the position to say that it is very much a lottery how an offence which has no express mental element will be interpreted." The same is said of English law: see Glanville Williams, *Textbook of Criminal Law* (2nd Ed, 1983) p 934; Andrew Ashworth, *Principles of Criminal Law* (2nd Ed, 1995) p 167.

9 It should be noted that where a provision is capable of more than one interpretation, the court ought to choose the construction which promotes the purpose of the statute, s 9A Interpretation Act (Cap 1,1985 Rev Ed), and which is in favour of the defendant, *Tuck & Sons* v *Priester* (1887) 19 QBD 629; *Teng Lang Khin* v *PP* [1995] 1 SLR 372.

10 The concept of negligence best fulfils the policy of imposing liability in circumstances only when the defendant can do something to promote the observance of the law.

11 (1978) 85 DLR (3d) 161, 171.

12 *Eg* Glanville Williams, *supra*, note 8, at 262; Smith & Hogan, *Criminal Law* (8th Ed, 1996) p 121.

of *mens rea* and placing the burden of proof appropriate to each offence where the legislature had been silent as to the *mens rea* requirement. He conceives the choice available as spanning five categories:

1. prosecution to prove intention or knowledge
2. prosecution to prove negligence
3. defence to disprove intention or knowledge
4. defence to disprove negligence
5. intention, knowledge, or negligence irrelevant to liability.[13]

Categories 1 and 5 embody the traditional common law approach in statutory interpretation of a provision which does not contain any express *mens rea* words. This is conceived as a straight-forward choice between requiring full *mens rea* or inferring that *mens rea* is dispensed with.

In two recent cases the Singapore courts have indicated that they are willing to consider a wider range of options than previously understood to be available. These developments will be analysed and assessed. Comparisons between these developments and the Penal Code provisions are also made.

I. THE TRADITIONAL COMMON LAW APPROACH

In order to set the advances made in the recent cases in context, it is appropriate to revisit the choice traditionally thought available to the courts when confronted with a statutory offence which does not expressly state that *mens rea* is required in its commission.

The starting point for the statutory construction of such offences is that there is a presumption that *mens rea* is required before a person can be held guilty of a criminal offence. This presumption is particularly strong where the offence is "truly criminal" in character, and can be displaced only where the statute is concerned with an issue of social concern.[14]

Where the presumption is displaced either expressly or by necessary implication from the effect of the statute, presence of *mens rea* is irrelevant to criminal liability. On the other hand, if the presumption is not displaced, the prosecution must show beyond reasonable doubt the existence of the guilty intention or knowledge. No *via media* is available between these extremes, except by the express intervention of the legislature.[15]

13 Michael Hor Yew Meng, *supra*, note 8, at 313, 340-341. Two further variations may be added: (2A) prosecution to prove gross negligence; and (4A) defence to disprove gross negligence.

14 *Gammon (Hong Kong) Ltd* v *AG of Hong Kong* [1985] AC 1.

15 *Sweet* v *Parsley* [1970] AC 132, 150 *per* Lord Reid; *Gammon (Hong Kong) Ltd* v *AG of Hong Kong, ibid.*

Despite *dicta* where it was said to be pointless to impose criminal liability on those who could not through reasonable efforts have prevented the commission of the proscribed act,[16] English law did not take the final step of construing offences silent on *mens rea* as ones requiring proof of negligence as the basis of criminal liability. Extra-judicially, Lord Devlin has explained the difficulty of imposing negligence liability in such situations this way:

> The conception of negligence, which has come to play so great a part in the civil law, has been excluded from the law dealing with minor offences where one would have thought it would have been most appropriate to find it. After all, what one wants to punish in these offences is carelessness in one form or another. ...But as a general principle the courts have never taken the step of treating negligence as meeting in this type of offence the requirement of *mens rea*....
>
> ...It is not easy to find a way of construing a statute apparently expressed in terms of absolute liability so as to produce the requirement of negligence. Take, for example, an offence like driving a car while it has defective brakes. It is easy enough to read into a statute a word like 'wilfully' but you cannot just read in 'carelessly'. You cannot say that no one should carelessly drive a car with defective brakes; you are not trying to get at careless driving. What you want to say is that no one may drive a car without taking care to see that the brakes are not defective. That is not so easy to frame as a matter of construction and it has never been done.[17]

Another reason suggested by Lord Devlin is the distinct difference in meaning ascribed to negligence in civil law as compared to criminal law:

> Negligence in criminal law has always meant the sort of recklessness that justifies the crime of manslaughter. It would have been a big step to introduce the civil concept of negligence into criminal law, and even bigger to introduce the wider concept of failing to keep an organization up to mark. At any rate it never has been done.[18]

16 *Eg Reynolds* v *Austin & Sons Ltd* [1951] 2 KB 135, 150 *per* Lord Devlin; *Lim Chin Aik* v *R* [1963] AC 160, 174. See also *Mohamed Ibrahim* v *PP* (1963) 29 MLJ 289, 293; *MC Strata Title No 641* v PP [1993] 2 SLR 650, 654.

17 Patrick Devlin, *Samples of Lawmaking* (1962) pp 75–76. But compare with Lord Reid in *Sweet* v *Parsley, supra*, note 15, at 150.

18 *Ibid*, at 76. See also *R* v *Adomako* [1994] 2 All ER 79 on the latest English pronouncement on the level of *mens rea* needed for manslaughter.

This is not relevant to our system of criminal law which is different from English law. The standard of negligence required under the Penal Code in offences such as sections 304A, 336, 337, 338 has been held to be no different from that of the civil law.[19]

The other alternative is to impose criminal liability on a showing of the commission of the proscribed act, unless the defendant is able to disprove negligence on his part. Thus, the defendant may be excused if he shows, on a balance of probabilities, that he laboured under an honest and reasonable belief in a state of facts which, if true, would make his act innocent. Despite it being recognised in the earlier English case of *R* v *Tolson*[20] and in other common law jurisdictions such as Canada, New Zealand and Australia,[21] this option was thought to be not possible in England[22] in view of the decision of the House of Lords in *Woolmington* v *DPP*.[23]

II. TWO RECENT LOCAL DEVELOPMENTS

A. *PP* v *Bridges Christopher*[24]

Lord Reid in *Warner* v *MFC* opined:

> If ... there is to be a halfway house between the common law doctrine and absolute liability, there could be an objective test: not whether the accused knew, but whether a reasonable man in his shoes would have known or have had reason to suspect that something was wrong.[25]

19 *Woo Sing* v *R* (1954) 20 MLJ 200; *PP* v *Mills* [1971] 1 MLJ 4. But see Stanley Yeo, *Fault in Homicide* (1997) pp 270–271, where he suggests that the degree of negligence required under s 304A Indian Penal Code (which is *in pan materia* with the local Penal Code) should be the same as in the English law of manslaughter since s 304A was intended to cover cases which would amount to negligent manslaughter under English law. This, however, leads to an unacceptably high standard of fault to be required in relation to other offences of negligence in the Penal Code.

20 (1889) 23 QBD 168, 181 *per* Cave J.

21 See Gerald Orchard, "The defence of absence of fault in Australasia and Canada" in *Criminal Law* (Peter Smith ed, 1987) p 117. There seems to be some uncertainty whether the Australian version requires the defendant to carry the legal or evidential burden, see Smith, Hogan, *supra*, note 12, at 122 at footnotes 19 and 20 therein and *infra*, note 105.

22 See *Warner* v *MPC* [1968] 2 All ER 356, 386 and *Sweet* v *Parsley*, *supra*, note 15, at 157–158 *per* Lord Pearce; but Lord Diplock at 164 did not think that *Woolmington's* case prevented an evidential burden being imposed on the defendant to give evidence of his mistaken belief.

23 [1935] AC 462.

24 [1998] 1 SLR 162 (Court of Appeal); [1997] 1 SLR 406 (High Court).

25 *Supra*, note 22, at 367.

In *Sweet* v *Parsley*, Lord Reid again said:

> It would often be much easier to infer that Parliament must have meant that gross negligence should be the necessary mental element than to infer that Parliament intended to create an absolute offence.[26]

This approach appears to have been adopted locally in *Bridges Christopher* with regards to section 5(1)(c)(i) of the Official Secrets Act:[27]

> If any person having in his possession or control any ... information which ... has been made or obtained in contravention of this Act ... communicates directly or indirectly any such information ...to any person other than a person to whom he is authorised to communicate it or to whom it is his duty to communicate it ...shall be guilty of an offence.

Despite the position in the UK[28] and in Malaysia[29] that the equivalent offence under their Official Secrets Act[30] was an "absolute" one in that the accused need not be shown to know that he had in his possession or control prohibited information, the Court of Appeal in *Bridges Christopher* held that the offence required proof of *mens rea*.[31] However, the level of *mens rea* required was not pitched at the level demanded under the traditional approach, that is, actual knowledge that the information was obtained in contravention of the Act.[32] It would suffice if there were reasonable grounds for the defendant to believe that the information was obtained in contravention of the Act.[33]

26 *Supra*, note 15, at 150.

27 Cap 213, 1985 Rev Ed. This was noted by Chan Wing Cheong, "Section 5 of the Official Secrets Act, *Bridges* and Beyond" [1998] SJLS 260, 276–279.

28 See Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911 (Cmnd 5104, 1972), para 20; *R* v *Fell* [1963] Crim LR 207; trial of Auberry, Berry and Campbell noted in Andrew Nicol, "Official Secrets and Jury Vetting" [1979] Crim LR 284; Rosamund Thomas, "The British Official Secrets Acts 1911–1939 and the Ponting Case" [1986} Crim LR 491, 500–501.

29 *PP* v *Lim Kit Siang* [1979] 2 MLJ 37, 42.

30 The equivalent provision in the UK is s 2(1) Official Secrets Act 1911. This has since been repealed by the Official Secrets Act 1989. In Malaysia, the equivalent provision is s 8(1) Official Secrets Act 1972 (Act 88). The Malaysian Act has since been amended by the Official Secrets (Amendment) Act 1986 (Act A A660).

31 See also the earlier case of *PP* v *Phua Keng Tong* [1986] 2 MLJ 279, 284.

32 If it were so, then an honest mistake regarding the source of the information would be sufficient to negative liability, see *DPP* v *Morgan* [1976] AC 182.

33 [1998] 1 SLR 162, para 47; [1997] 1 SLR 406, para 78. It is admitted that the Court of Appeal is not clear on this point, compare with [1998] 1 SLR 162, para 46. However, I have sought to argue, *supra*, note 27, that it is desirable to construe the *mens rea* requirement as including having a "reasonable ground to believe" for two reasons. First of all, this brings a greater consistency between the offences under s 5(1) and (2) of the Official Secrets Act (Cap 213,1985 Rev Ed). Secondly, it "balances the concerns that criminal liability may be extended too far with the need for an efficient system for the protection of information", *supra*, note 27, at 278–279.

It is a remarkable breakthrough for negligence liability for the court to find that an objective assessment of the means of acquiring knowledge is needed before criminal liability may be imposed where the offence does not expressly state that *mens rea* is required. A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing,[34] and this is judged from the perspective of a reasonable person in the offender's shoes.[35]

It should be noted that on this approach, the burden is on the Prosecution to prove, beyond reasonable doubt, the reasonable means of acquiring this knowledge. In the scheme suggested by Michael Hor, this would fall in category 2.

B. *MV Balakrishnan* v *PP*[36]

The appellant in this case was convicted of two charges by the District Court. The first charge was under section 35(1) of the Road Traffic Act[37] for permitting his employee to drive a Class 4 motor vehicle when the employee only possessed a Class 3 driving licence. The second charge was the consequential one of permitting the same employee to drive the motor vehicle without proper insurance coverage against third-party risks under section 3(1) of the Motor Vehicles (Third-Party Risks and Compensation) Act.[38] The appellant was fined and disqualified from holding all classes of licence for 12 months. He appealed against his sentence and conviction.[39]

The appellant admitted that he was aware that his employee only had a Class 3 driving licence. His defence was that he did not know that the lorry was a Class 4 motor vehicle. He said that he relied on the representations made by one Lee that the motor vehicle was a Class 3 vehicle and therefore did not check the vehicle logbook.[40]

34 S 26 Penal Code (Cap 224, 1985 Rev Ed).

35 *Koh Hak Boon* v *PP* [1993] 3 SLR 427, 430.

36 [1998] 1 CLAS News 357. Some earlier cases appear to have envisaged this approach, *eg Melan bin Abdullah* v *PP* [1971] 2 MLJ 280; *PP* v *Pengurus, Rich Foods Products Sdn Bhd* [1982] 1 MLJ 302; *PP* v *Osman bin Apo Hamid* [1978] 2 MLJ 38. However, it is submitted that the first two cases are weak since an express defence of reasonable care was provided for in the legislation involved therein, and the reference to negligence in the third case is at best equivocal. *Cf* M Sornarajah, "Defences to Strict Liability Offences in Singapore and Malaysia" (1985) 27 Mal LR 1, 22.

37 Cap 276, 1997 Rev Ed.

38 Cap 189,1985 Rev Ed. This provision has since be replaced by Motor Vehicles (Third-Party Risks and Compensation) (Amendment) Act 1998 (Act No 23 of 1998).

39 His subsequent application to refer a question of law for the decision of the Court of Appeal concerning the meaning of "special reasons" which excuse an offender from the mandatory disqualification order was turned down, *MV Balakrishnan* v *PP* [1998] 3 SLR 586.

40 *Supra*, note 36, at para 3.

Section 35 of the Road Traffic Act states:

> Except as otherwise provided in this Act, no person shall drive a motor vehicle of any class or description on a road unless he is the holder of a driving licence authorising him to drive a motor vehicle of that class or description, and no person shall employ or permit another person to drive a motor vehicle on a road unless the person so employed or permitted to drive is the holder of such a driving licence, and any person who acts in contravention of this subsection shall be guilty of an offence.

The district judge found that the offence under this section was one which required *mens rea*. He found, however, that the appellant was wilfully blind to the fact that the lorry was a Class 4 vehicle by refraining to make proper enquiries.[41]

The learned Chief Justice differed on this point. Although, as a rule of construction of statutory offences, there is a presumption that *mens rea* is an ingredient, he found that the presumption had been displaced.[42] In doing so, he referred to the classic common law cases on strict liability[43] and the construction of the equivalent provision in England.[44] In particular, he found that:

> ...a construction of strict liability would promote observance of the law by persons who possess the means to take appropriate action to prevent the prohibited act. I found that as the proprietor and employer, the appellant was one such person in a position of control to prevent the commission of the prohibited act.[45]

41 *Ibid*, at para 4. For the concept of wilful blindness, see *PP* v *Hla Win* [1995] *2* SLR 424, 438, 440 (Yong CJ dissenting); *Chiaw Wai Onn* v *PP* [1997] 3 SLR 445, paras 43–46. If the District Judge were correct in finding that the offence required *mens rea, ie* knowledge that his employee did not hold a driving licence for that class of motor vehicle, it would follow that a mistaken assumption by the defendant that his employee did have such a licence would defeat the prosecution's case. Such a mistake need not be a reasonable one, see *supra*, note 32 and accompanying text; Colin Howard, "The Reasonableness of Mistake in the Criminal Law" (1961) 4 UQLJ 45. The requirement that the mistake of fact be one of "good faith" in ss 76, 79 Penal Code (Cap 224,1985 Rev Ed) can only apply in relation to an element of the offence which does not require advertence. This approach is not only logical but also brings our criminal law in line with the common law, see Smith, Hogan, *supra*, note 12, at 222.

42 *Supra*, note 36, at para 12.

43 *Sweet* v *Parsley*, *supra*, note 15; *Lim Chin Aik* v *R*, *supra*, note 16; *Gammon Ltd* v *AG of Hong Kong*, *supra*, note 14; *Pharmaceutical Society of Great Britain* v *Storkwain* (1986) 83 Cr App R 359.

44 S 87(2) Road Traffic Act 1988, *Ferrymasters Ltd* v *Adams* [1980] RTR 139.

45 *Supra*, note 36, at para 12.

A dramatic development came two paragraphs later where he held:

> I was not prepared to find, however, that the offence was one of absolute liability. Some care had to be taken in determining if there was a defence available to an offence under s 35(1) which would render it a strictly liable one.[46]

Reference was made to the Canadian case of *R* v *City of Sault Ste Maria*,[47] the comment of Glanville Williams[48] and *dicta* expressed by Lord Pearce in *Sweet* v *Parsley*[49] for the preferred compromise between finding that an offence required *mens rea* or was one of absolute liability. The learned Chief Justice came to the conclusion that:

> These principles applied to the present appeal made it clear that s 35(1) created a public welfare offence which, being without a clear indication that liability is absolute, and without any words such as "knowingly" or "wilfully" expressly to import *mens rea*, was undoubtedly an offence in the category of strict liability to which the prosecution is relieved the burden of proving full *mens rea*, but it would be open to the defendant to prove that all due care had been taken. ...The burden of proof required would thus fall to be the prosecution's to demonstrate beyond reasonable doubt that the defendant committed the prohibited act, while it would be the defendant's onus to establish on a balance of probabilities that he has taken reasonable care. ...[S]uch an interpretation would honour Parliament's intention with respect to road traffic regulation in the interests of public safety.[50]

Hence, the appellant could have escaped liability if he showed that he had taken reasonable care to prevent his employee from carrying out the prohibited act. This he could not do.[51] Under the scheme proposed by Michael Hor, this approach would fall within category 4.

46 *Ibid*, at para 14. There is no suggestion in the judgment that the holding should be limited to a consideration of the possible defence of "lawful excuse" under s 131(1)(d) Road Traffic Act (Cap 276, 1997 Rev Ed).

47 *Supra*, note 11. The reasoning of the case and its understanding of the common law cases have been criticised, Don Stuart, *Canadian Criminal Law* (1995) pp163–165.

48 *Supra*, note 8, at 262: "a half-way house between the *mens rea* and strict responsibility ... that is responsibility for negligence".

49 But it should be noted that Lord Pearce thought that such a compromise was *not* possible in view of *Woolmington* v *DPP*, *supra*, note 15, at 158.

50 *Supra*, note 36, at para 17.

51 *Ibid*, at para 19. With regard to the offence under s 3(1) Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 1985 Rev Ed), the learned Chief Justice followed *PP* v *Kum Chee Keong* [1994] 1 SLR 231 in finding that it was "a strictly liable offence for which there is a defence of reasonable care" and that "my views in relation to finding that s 35(1) created a strict liability offence apply to s 3(1)". English cases on the equivalent provision were also referred to. See *supra*, note 36, at paras 20, 21.

III. REVIEWING THE DEVELOPMENTS

These two cases are important developments which affect our understanding of the scope of criminal liability. It has been scarcely five years since the learned Chief Justice had declared "the nature of strict liability offences is such that they may be committed even when all reasonable steps have been taken to ensure that they are not committed".[52] Several points may be raised.

First, a belated word on the terminology of "strict" and "absolute" liability. In its popular usage, an offence of strict liability means one in which the prosecution need not show any *mens rea* in respect of one or more elements in the *actus reus* in order to secure a conviction.[53] Hence, the state of mind of the accused, including the presence of intention, knowledge or even negligence, as a species of *mens rea*, is irrelevant.[54] In *Balakrishnan*, however, the term "strict" liability offence was used in the sense that the absence of negligence is a defence to criminal liability, whereas "absolute" liability referred to offences wherein no defences are available at all.[55] The same use of the term "strict liability" was made by Chua J in the earlier case of *PP* v *Vadivelu*[56] but was corrected by the learned Chief Justice in *Naranjan Singh* v *PP*.[57] Its use has apparently made a return here.

The use of the term "absolute" liability is also misleading in that it may lead one to think that defences based on a lack of *actus reus* do not apply at all. They do. A person cannot be punished for littering if the act were committed involuntarily.[58]

Secondly, the traditional English approach and its reluctance to impose negligence liability where the statute is silent on the requirement for *mens rea* is no longer followed. In doing so, the law from other common law jurisdictions may be resorted to.

52 *Jupiter Shipping Pte Ltd* v *PP* [1993] 2 SLR 69, 71.

53 LH Leigh, *Strict and Vicarious Liability* (1982) p 1; *Naranjan Singh* v *PP* [1993] 1 CLAS News 237; PP v *Yong Heng Yew* [1996] 3 SLR 566, 569; Michael Hor, *supra*, note 8, at 315.

54 Even where liability is "strict", it is commonly acknowledged that the general defences such as automatism, duress, necessity, infancy and insanity still apply, see Smith, Hogan, *supra*, note 12, at 116–117; GL Peiris, "Strict Liability in Commonwealth Criminal Law" (1983) 3 LS 117, 142. In *PP* v *Yong Heng Yew*, *ibid*, at 568 the learned Chief Justice appeared to accept the defences of accident and automatism. However, *DPP* v *H*, *The Times*, 2 May 1997, may suggest that the defences relating to *mens rea* such as insanity are not relevant to strict liability offences.

55 This follows the Canadian usage.

56 [1992] 1 SLR 105.

57 *Supra*, note 53.

58 PP v *Yong Heng Yew*, *supra*, note 53, at 568. See Sornarajah, *supra*, note 36; Smith, Hogan, *supra*, note 12, at 117.

Thirdly, and most unfortunately, it is noted that there is no guidance as to when the adoption of negligence liability will be made. It is difficult to see in what way the Official Secrets Act and the Road Traffic Act are different from laws regulating the sale of food or the sale of obscene books. Yet under the *Christopher Bridges* and *Balakrishnan* approaches, some finding of mental fault on the part of the defendant is needed. Under the common law approach, the operation and scope of *mens rea* defences, such as infancy and insanity, are, at best, unclear.[59] A result-oriented approach is certainly not conducive to a clear and authoritative enunciation of legal principle which can guide the lower courts in future cases.

In *R* v *City of Sault Ste Maria*,[60] which was relied on in *Balakrishnan*, three categories of offences were recognised. The first category being offences where *mens rea* must be proved by the prosecution. The second being offences where the prosecution only needs to show the doing of the prohibited act, but the accused may avoid liability by proving he took all reasonable care. The last category being offences of "absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault".

Dickson J, as he then was, gave the following guidance as to the classification of offences:

> Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.[61]

It can be readily seen that the criteria proposed for distinguishing offences of "absolute liability" from offences in the other two categories are no different from those used in the traditional approach in classifying offences

59 *Supra*, note 54.
60 *Supra*, note 11.
61 *Ibid*, at 182.

as ones requiring proof of *mens rea* or not.[62] This approach has already been pointed out to be vague and unsatisfactory. Michael Hor writes:

> Received wisdom says that strict liability attaches to offences involving the protection of public safety and welfare, but it has often been observed that one would be hard put indeed to find a piece of criminal law which is not for the purpose of protection of public safety or welfare.[63]

One possible advantage in the above approach is that there is an enhanced presumption against such "absolute" liability.[64] However, it is submitted that it is much better not to recognise "absolute offences" at all on principle: criminal liability based on negligence as the minimal fault requirement adequately meets the utilitarian goals of the criminal law in encouraging those who carry out hazardous activities to take the utmost care. To extend criminal liability any further is simply unfair and arbitrary.[65]

There is also the matter in deciding whether the approach in *Christopher Bridges* or the approach in *Balakrishan* should be adopted even if the court is minded to impose liability on the basis of negligence. The two approaches may lead to very different results. This may be illustrated with respect to the defence of mistake of fact and the levels on which it operates in the criminal law. Under the approach in *Christopher Bridges*, the prosecution has to prove at least negligence on the part of the defendant. If the defendant claims he made a mistake, he is not relying on mistake as a defence *per se*, but is in fact denying an essential ingredient of the Prosecution's case by alleging that he did not have the necessary *mens rea*. Under the approach in *Balakrishnan*, a mistake is used as an affirmative defence in order to excuse the defendant from liability. The matter may also be put in the form of the allocation of the burden of proof, which can be a matter of crucial importance in some cases. This will be elaborated on later with respect to the Chapter IV approach.[66]

62 A much clearer basis for identifying offences where the defendant should be given the opportunity to prove his action was done without guilty intent is when the offence involves a term of imprisonment, Francis Bowes Sayre, "Public Welfare Offences" (1933) 33 Colum L Rev 55, 79.

63 *Supra*, note 8, at 335. In comparison, the defence of reasonable mistake of fact does not appear to be restricted to any class of offences in Australia, Laura DiSanto, Sheila McAllister, "The Defence of All Reasonable Care" (1980) 18 Alberta L Rev 294, 302.

64 Indeed, the Canadian Supreme Court has held that the due diligence defence is constitutionally required for any penal law that imposes absolute liability if it may potentially deprive one's liberty interest: *Reference re Section 94(2) of the Motor Vehicle Act (BC)* (1985) 48 CR (3d) 289. While under *Sault Ste Marie*, offences of absolute liability were to be rare, it is now not possible at all if imprisonment may be imposed.

65 Jerome Hall, "Interrelations of Criminal Law and Torts II" (1943) 43 Col L Rev 968, 994, goes much further and describes it as "indiscriminate terrorism".

66 *Infra*, Part V.

Michael Hor has argued in favour of giving courts a full spectrum of choice. He admits:

> ...this is a task normally associated with Legislatures; but what the Legislature has omitted to do, the courts must resolve. ...It may be argued that this opens the law to charges of arbitrariness and judicial legislation. As for arbitrariness, it is no more so than what exists at the moment and is perhaps unavoidable in view of legislative failure to provide for *mens rea*. Concerning judicial legislation, again it is no more so than what the cases have been doing, and it can surely no longer be denied that much of that which traditionally be considered "interpretation" is just legislation by another name.[67]

It is submitted that it is no answer to charges of arbitrariness and judicial legislation to say that a proposed system is no worse than the present. Two wrongs cannot make a right. As to the allegation of legislative inaction, it is simply not true. The Legislature *has* provided *via* section 40(2) of the Penal Code for the application of the general defences under Chapter IV for offences "under any other law for the time being in force". It is to this "Chapter IV approach"[68] that we turn to next.

IV. CHAPTER IV APPROACH

This approach emphasises that the provisions found in Chapter IV of the Penal Code apply to all offences found within the Code or in some other statute.[69] Hence, there can be no criminal liability without some form of guilty mind.[70] Thus, on a charge of rape under section 376 of the Penal Code by reason of the fact that the complainant was under 14 years of age, the appellant's reasonable belief that the complainant was over 16 years was held, by a majority in *Abdullah* v *R*,[71] to be a relevant consideration to his criminal liability.[72] This may be compared with the English case of *Prince*,[73] where it was held that for the offence of taking an unmarried girl under the age of 16 years out of the possession of the father,[74] it was no defence that the defendant had a reasonable belief that the girl was above that age.[75]

67 *Supra*, note 8, at 341.
68 Koh, Clarkson, Morgan, *supra*, note 7, at 73.
69 Ss 6, 40(2) Penal Code (Cap 224, 1985 Rev Ed).
70 Barring occasional lapses such as *Mohammed Ibrahim*, *supra*, note 16, which, it is submitted, was wrongly decided.
71 (1954) 20 MLJ 195.
72 Under ss 52, 79 Penal Code (Cap 224, 1985 Rev Ed), in order for a mistake of fact to be a defence it must be one which is made in "good faith", *ie* one which is made with "due care and attention".
73 (1875) LR 2 CR 154; 13 Cox CC 138; [1874–80] All ER 881.
74 S 55 Offences Against the Person Act 1861. Now see s 20 Sexual Offences Act 1956.
75 Of the ten judges who upheld the conviction, two theories were relied on. One theory is that the legislature had intended to exclude *mens rea* for the offence; the other that

The same approach ought to apply for offences found outside the Penal Code by virtue of section 40(2) of the Penal Code. In *Tan Khee Wan Iris* v *PP*,[76] the learned Chief Justice stated that there was no basis for excluding a defence of mistake found in the Penal Code even for an offence found in another statute unless it is clear that the legislature in creating the offence intends to exclude it.

Despite a confident prediction in 1989 that the Chapter IV approach will be the one to take hold in future,[77] that has not come true. The local courts have continued to rely on the English common law on strict liability, as seen most recently in *Balakrishnan*. It is difficult to comprehend why the two recent cases to the contrary, *Tan Khee Wan Iris* v *PP*[78] and *PP* v *Teo Eng Chan*[79] had been ignored. Perhaps the holding of *Tan Khee Wan Iris* failed to make an impact because the Prosecution had conceded in that case that the defence of mistake applied to an offence under section 18 of the Public Entertainments Act,[80] an offence found to be one of strict liability.[81] It is more curious that *Teo Eng Chan* was not referred to in subsequent cases on strict liability. In that case, the common law presumption of *mens rea* exemplified in the English case of *DPP* v *Morgan*[82] was clearly rejected in favour of the scheme found in the Penal Code.[83] Hence, the accused may be convicted of rape unless he can show, on a balance of probabilities, that he made a reasonable mistake that the victim consented. An honest mistake *per se*

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the defendant's conduct was immoral regardless of the girl's age. Indian cases appear to have preferred the common law approach: *Krishna Maharana* v *Emperor* AIR 1929 Patna 651; Ratanlal, Dhirajlal, *The Indian Penal Code* (27th Ed, 192) p 404.

76 [1995] 2 SLR 63, 67.

77 Koh, Clarkson, Morgan, *supra*, note 7, at 73, 76. See also Balasubrahmanyam, *supra*, note 6; Bron McKillop, *supra*, note 8, at 123; Sornarajah, *supra*, note 36, at 4; Molly Cheang, *Criminal Law of Singapore and Malaysia: Principles of Criminal Liability* (1990), pp 59–60.

78 *Supra*, note 76. It is possible to refer to earlier cases which have applied the General Exceptions found in the Penal Code to other statutory offences, *eg Alexander von Roessing* v *R* (1905) 9 SSLR 21; *Arumugam* v *R* (1947) 13 MLJ 45.

79 [1988] 1 MLJ 156.

80 Cap 257, 1985 Rev Ed.

81 Whether this is indeed a strict liability offence is questionable. The learned Chief Justice considered it to be one of strict liability because:

> ... s 18(1)(a) of the Act prohibits any person from providing public entertainment save within a special exception or proviso, namely, with a valid licence. The burden of proving that the case falls within the special exception or proviso is therefore on the accused .... There is no burden on the prosecution to prove that there was no licence.

Supra, note 76, at 66. It would have been better to find it a strict liability offence on the basis that the prosecution need not show that the proscribed act (providing public entertainment without a licence) was done intentionally or knowingly in order for a conviction to follow, see *supra*, note 53 and accompanying text.

82 *Supra*, note 32.

83 S 76 Penal Code (Cap 224, 1985 Rev Ed).

is not sufficient.[84] This decision may be thought to relate to the offence of rape only, but its impact on the scope of criminal liability in Singapore is far greater.

Sornarajah suggests that a "two track system of criminal law" be recognised in Singapore. One track consisting of the Penal Code and other statutory offences subject to it and the second track consisting of statutory offences involving strict liability.[85] Michael Hor has convincingly argued that this compromise cannot be reconciled with the present case law, nor is it supportable on principle. Many Penal Code offences have similar counterparts in other statutes. There is no rationale for treating similar offences so differently.[86]

V. COMPARING THE APPROACHES

If the approach in *Balakrishnan* were to apply to all non-Penal Code offences in future, it may be thought that this is no different from the Chapter IV approach advocated above. In both instances, the accused is able to avoid criminal liability by showing, on a balance of probabilities, that he exercised reasonable care.

It is submitted that the approaches are not exactly the same, and that it is desirable for the courts to use the Chapter IV approach on principle.

First, there is no space for a defence of reasonable mistake to be inferred in the present scheme of criminal law in Singapore. The Legislature has not been silent on this point. The general defences found in Chapter IV of the Penal Code are, by virtue of section 40(2), universally applicable to all offences.

Secondly, the approach in *Balakrishnan* is unnecessarily imprecise. It was suggested that so long as the appellant was not in a position of control to prevent the commission of the proscribed act,[87] or if reasonable care had been taken,[88] he would not be liable for the offence. This may be compared with the defences found in the Penal Code which lay down strict requirements that need to be satisfied. Hence, under section 79, it must be a mistake of fact made in "good faith"[89] such that the defendant

84 The Brunei case of *PP* v *Zanial Abldin bin Ismail* [1987] 2 MLJ 741 to the contrary was not followed.

85 Sornarajah, *supra*, note 36, at 6.

86 Michael Hor Yew Meng, *supra*, note 8, at 338–339. In addition to the overlapping offences identified by Michael Hor, *ibid*, at footnote 101, the offences relating to sale of unfit food or drink found in s 273 Penal Code (Cap 224, 1985 Rev Ed) may be compared with s 40 Environmental Public Health Act (Cap 95, 1988 Rev Ed) and *PP* v *Teo Kwang Kiang* [1992] 1 SLR 9.

87 *Supra*, note 36, at paras 12, 18, 19.

88 *Ibid*, at para 17.

89 As defined in s 52 Penal Code (Cap 224, 1985 Rev Ed).

believes himself to be justified by law in doing it; whereas under section 80, the accident must be done "without any criminal intention or knowledge, in doing a lawful act in a lawful manner, by lawful means, and with proper care and caution". Under section 81, an act done which is likely to cause harm must be done "without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property" in order to amount to a defence.

The "due diligence" defence in Canada and New Zealand has been described in this way:

> In many cases the basis of this defence will be an honest and reasonable belief in facts which, if true, would make the conduct innocent, or reasonable failure to know of facts constituting an offence, but even if the relevant facts were known the defence is available if D was not negligent in bringing about the forbidden event, had done what a reasonable person would have done in the circumstances, or had taken all reasonable care to prevent the proscribed conduct or state of affairs.
>
> This principle subsumes a number of circumstances which are commonly regarded as distinct grounds of exculpation. In addition to reasonable mistake of fact, it includes cases where a prohibited event or circumstance resulted from an act of a stranger or an event which D was unable to prevent (an 'Act of God', or 'inevitable accident'), cases where it was impossible for D to comply with the law, cases where D's conduct was involuntary, and cases where D acted under compulsion or in circumstances of necessity. In every case, however, it will be essential that the exculpatory circumstance was not attributable to earlier fault on D's part, although for the defence to be defeated on this ground it seems that the kind of event which occurred will have to have been 'clearly foreseeable', and that it will not necessarily suffice that D was acting illegally or 'negligently'.[90] (footnotes omitted)

The concept of "exculpatory circumstances" is extremely fluid and open to future development. The possibility of too loose an approach working to the disadvantage of the defendant may be seen in the English case of *R* v *Prince*,[91] where one of the majority judgments[92] suggested that because the act of the accused in taking an unmarried girl under 16 years out of the possession of her father[93] was immoral or "wrong in itself", his reasonable mistake concerning the girl's age was irrelevant. In contrast,

90 Gerald Orchard, *supra*, note 21, at 117.
91 *Supra*, note 73.
92 *Per* Bramwell B; Kelly CB, Cleasby B, Grove J, Pollock B, and Amphlett B concurring.
93 *Cf* s 361 Penal Code (Cap 224, 1985 Rev Ed) and the exception stated therein.

in the local case of *Abdullah* v *R* mentioned earlier,[94] it was held by the majority that if the defendant's actions would not amount to a crime or tort if his mistaken belief had been correct, he would satisfy the requirement of being "justified by law" in doing that act. A clear division between crime and immorality is made:

> What the law does not forbid it allows, and what a law allows is I think justified by law. I do not think it is possible to have an intermediate area that is not forbidden but not justifiable.[95]

It may be added that an assessment of whether the act is somehow immoral is not only undesirable in view of the Penal Code, but it is also fundamentally unsound in a pluralist society such as Singapore.

Sornarajah has proposed that the defences available to strict liability should not be tied to the defences found in the Penal Code, but should be defined flexibly according to the demands of individual justice or the objective of the legislation.[96] However, it is submitted that in the field of criminal law, it is highly undesirable to adopt an approach that is *ad hoc*, The danger of inconsistency and perceived arbitrariness is great.

It is submitted that it is not only in accordance with the structure of the Penal Code, but it is also a far clearer guide to judges, legal counsel and the accused, for only those defences found in Chapter IV of the Penal Code to be recongised, unless they are excluded or additional ones specifically enacted. It is far too nebulous to recognise defences which show some lack of fault on the part of the accused or that the action is not immoral.

Thirdly, on a review of *Balakrishnan*, the case would not have been decided any differently if the Chapter IV approach had been used instead. Under section 79 of the Penal Code, only a mistake made in "good faith", *ie* with "due care and attention" suffices.[97] In *Balakrishnan*, the learned Chief Justice said:

> I was not satisfied with the defence that he relied on [the seller's representative's] representations as to the class of the lorry. ...Making enquiries of a sales representative when other means of knowledge, for example, the vehicle logbook, were available did not sufficiently demonstrate that reasonable care was taken. The fact of the matter was that he had the means to take reasonable care to prevent his employee from carrying out the prohibited act but failed to exercise those means.[98] ...

94 *Supra*, note 71.
95 *Ibid*.
96 Sornarajah, *supra*, note 36, at 6.
97 *Supra*, note 89.
98 *Supra*, note 36, at para 19.

> Lee, the purported 'sales representative' who sold the lorry to the appellant, was not a sales representative whom one, in the ordinary course and according to the ordinary commercial experience of people, would rely on for representations as to specifications of a vehicle. He was a hydraulic coordinator trying to earn a few extra dollars on the side. In any case, the evidence as to Lee's representations was not accepted in the court below. In the circumstances, I was not prepared to find that the appellant had held an innocent, but mistaken, belief as to the class of the vehicle nor that Lee had given the appellant reasonable ground to hold such a belief.[99]

However, there is a difference between the approach in *Bridges Christopher* and the Chapter IV approach. This arises from the party on whom the legal burden of proof is placed. This difference can be illustrated by *Tan Khee Wan Iris* v *PP*.[100] In that case, the appellant was convicted by the lower court for having provided or assisted in providing public entertainment without a licence in the early hours of 1 January 1994, contrary to section 18(1)(a) of the Public Entertainments Act.[101] The appellant applied for a licence for the full duration of the performance, *ie* up to 6 am on 1 January 1994. However, due to an oversight on the part of the licensing officer, one part of the licence stated that it was valid until 6 am on 1 January 1994 while another part stated that it was valid until 31 December 1993.

It may be recalled that the provision was held to create a strict liability offence, but that the appellant was entitled to rely on section 79 of the Penal Code in her defence. By virtue of section 107 of the Evidence Act,[102] the burden was placed on the appellant to show on a balance of probabilities that she acted under a mistake and that she believed in good faith that she had a valid licence for the relevant period (*ie*, between midnight on 31 December 1993 to 6 am on 1 January 1994). This the appellant could not do:

> On the evidence, I am satisfied that the appellant was mistaken as to the validity of the licence for the relevant period. ...The appellant testified that she glanced at the licence after it was issued. As it said that she was licensed to provide public entertainments and told her to refer to 'the attached programme' which was submitted by her, she assumed that it was in order. ...it was an easy mistake for a person to make.

99 *Ibid*, at para 27.
100 *Supra*, note 76.
101 Cap 257, 1985 Rev Ed.
102 Cap 97, 1997 Rev Ed.

> However, it is not enough for the appellant to show that she was mistaken. She must also show that she believed in good faith that she had a valid licence for the relevant period. The test of whether a mistake was made in good faith is not whether the mistake was an easy one to make nor whether a reasonable person could make the mistake. The test is that laid down in s 52 of the Penal Code. The test is whether there was due care and attention. The mistake may be a natural one to make and it may be one which reasonable persons often make. Nevertheless, the defence is not made out unless it is shown on a balance of probabilities that the appellant exercised due care and attention. ...
>
> ...the appellant's defence is, in essence, that she did not read the whole of the licence, and that even if she did, it would not be apparent to her that the licence was not valid for the relevant period. ...this is not sufficient to discharge her burden of proof. This is because although it was not apparent on the face of the licence that it was not valid for the relevant period, it was nevertheless patent on its face that there was something wrong with it. ...
>
> The mistake on the face of the licence here was an obvious one. If the appellant had read the whole of the licence and had given any thought at all to the matter, she would have discovered that the licence stated that it expired on 31 December 1993.[103]

However, owing to the inconsistency in the licence issued, it was "impossible to say one way or the other whether there was a valid licence for the period between midnight of 31 December 1993 and 6 am on 1 January 1994".[104] If the approach in *Christopher Bridges* had applied in this case,[105] such that the prosecution had to affirmatively prove negligence on the part of the appellant, she would not have been liable:

> ...the offence [under s 18(1)(a) of the Public Entertainments Act] is one of strict liability so far as the licence is concerned. ...the prosecution is not required to show any *mens rea* regarding the absence of a licence.

103 *Supra*, note 76, at 67–68.

104 *Ibid*, at 66.

105 There is another possible alternative in that the defendant only has an evidential burden of proof to show that he had reasonable grounds for his mistaken belief. The ultimate legal burden still rests on the prosecution that the defendant did not honestly and reasonably hold this belief. See Peter Brett, "Strict Responsibility: Possible Solutions" (1974) 37 MLR 417; *Sweet* v *Parsley*, *supra*, note 15, at 164 *per* Lord Diplock; *Kidd* v *Reeves* [1972] VR 563; *Mayer* v *Marchant* (1973) 5 SASR 567; *He Kaw Teh* v *R* (1985) 157 CLR 523; *Strawbridge* [1970] NZLR 909, 916 but see *Civil Aviation Department* v *MacKenzie* [1983] NZLR 78. The weight of judicial opinion locally is against imposing an evidential burden of proof of a defence on the accused.

> This is unfortunate for the appellant, for had it been otherwise, I am of the view that the prosecution would not have been able to show that the appellant did not possess a valid licence for the relevant period and the appellant would have been entitled to an acquittal. Given the contradiction on the face of the licence, it would have been impossible to show one way or the other whether there was or was not a valid licence.[106]
>
> ...If the burden had been on the prosecution to show that there was no valid licence for the relevant period, the ... charge against the appellant would similarly not have been made out. Unfortunately for the appellant, the burden was on the appellant to show that she had a valid licence. This cannot be done and the burden is then on her to show that by reason of a mistake of fact she believed in good faith that she had a valid licence.[107]

The tension between these two approaches is readily apparent. The Chapter IV approach is far more demanding than the one in *Christopher Bridges*. The danger of injustice is great in this instance as there are again no guidelines to indicate when one approach should be applied rather than the other.

A final possible difference between the approach in *Christopher Bridges* on the one hand and the approaches in *Balakrishan* and in Chapter IV on the other, is whether a showing of simple ignorance is sufficient to avoid liability. Ignorance is commonly distinguished from mistake in the sense that there is complete indifference to the duty cast on him in the former case, but in the latter case, the defendant had consciously thought about it but had come to a mistaken conclusion.[108]

In *Christopher Bridges,* since the Prosecution had to show either that the defendant knew or had reason to know that the information was derived in contravention of the Official Secrets Act, the defendant would not be liable even if he never gave any thought (*ie*, was merely ignorant) as to the source of the information. He need not have consciously thought about it. On the other hand, in *Balakrishnan*, it would not be sufficient for the defendant there to be merely ignorant whether the vehicle was a Class 3 or 4 vehicle. He must have thought about it and decided one way or the other.

106 *Supra,* note 76, at 66.
107 *Ibid,* at 68.
108 Glanville Williams, *supra,* note 8, at 151–152; *Proudman* v *Dayman* (1941) 67 CLR 536, 541 *per* Dixon J, 538–539 *per* Rich ACJ; Bron McKillop, *supra,* note 8, at 128. The distinction is by no means clear, see also Colin Howard, *Strict Responsibility* (1963) pp 88–96.

It is submitted that it is too fine a distinction sought between ignorance and mistake. In most cases, it will not be possible to prove the defendant's state of mind with any precision.[109] If the scenario in *Balakrishnan* referred to above should occur, it would be easily resolved by finding that the assumption made by him was reasonable or not. It is highly unlikely that a court would spend any time on deciding if the assumption were made consciously or unconsciously. In any case, there can be little, if any, distinction in blameworthiness between the states of simple ignorance and a positive mistake. If there is nothing to put a reasonable person on inquiry, the person who remains unaware of a fact because he does not think about it is probably no more blameworthy than one who makes a conscious and reasonable mistake.[110]

VI. CONCLUSION

Recognising negligence as the minimum fault requirement for criminal liability avoids the conviction of the blameless while giving as much effect as is practicable to the prevention or avoidance of the proscribed conduct. The advance made in the cases of *Christopher Bridges* and *Balakrishnan* is that the harm done is not seen in isolation from the circumstances in which it was brought about. Instead of the court trying to classify the offence as a "public welfare offence" or not where the statutory provision is silent as to the need for *mens rea*, the focus is on whether the defendant *should* be made liable. The facts of the case figure prominently in place of the object of the offence, level of penalty, administrative efficiency *etc*.

Under the *Christopher Bridges* approach, the prosecution must show beyond reasonable doubt that he did not exercise such care. No burden of proof is placed on the defendant, except the evidential one. Under the *Balakrishnan* approach, the defendant is given the opportunity of establishing that he did in fact exercise reasonable care. If he can show this on a balance of probabilities, no liability will follow. In both cases, the defendant is subjected to an objective or reasonable standard to be expected of him in the circumstances.

It is a pity that criminal law in Singapore is still thought of as a common law subject. The approach of the courts in these two cases drew on opinions from the case law of various times and places with scant regard for the systematic unity of the Penal Code. The principle that there should

109 Peter Brett, *supra*, note 105, at 435; Howard, *Criminal Law* (4th Ed, 1982) p 367; commentary by JC Smith [1982] Crim LR 448. See also the differing opinions in *Weerakoon* v *Ranhamy* (1921) 23 NLR 33, 45, 51, 58.

110 Gerald Orchard, *supra*, note 21, at 119 citing *Kain & Shelton Pty Ltd* v *MacDonald* (1971) 1 SASR 39, 45.

be no criminal responsibility without fault is already embodied in Chapter IV of the Penal Code. Unlike the common law, the intention of the legislature is without doubt. It should be difficult for a court to infer that the legislature had intended to exclude the application of these principles in the creation of other statutory offences.[111]

It is submitted that the courts should firmly grasp the nettle in the recent developments and finally reject the possibility of imposing liability without fault. However, this should not be through the adoption of common law but on the basis of a finely worked out compromise seen in the Penal Code provisions.[112] As to the argument that the Penal Code provisions may not adequately cater to public welfare offences developed in the nineteenth century,[113] the words of the Supreme Court of Ceylon in *Perera* v *Munaweera*[114] may be recalled:

> We were invited to consider the undesirability of [Section 40] of the Penal Code making [Section 79] inflexibly applicable to offences to which, under modern conditions, Parliament may, in the interests of justice, consider the defence of *bona fide* mistake to be inappropriate. This argument does not impress us. In such a contingency, it is always open to Parliament to enact that, in regard to any particular criminal statute, Chapter 4 of the Penal Code or any part of it shall not apply: [Section 40(2)] would then stand repealed or amended to that extent.

CHAN WING CHEONG*

111 See also Colin Howard, "The Protection of Principle Under a Criminal Code" (1962) 25 MLR 190; *cf* Michael Hor, *supra*, note 8, where he suggests otherwise.

112 Where the Legislature wished to impose a higher standard of care on the defendant, it had expressly done so, *eg* ss 5(4), (5), 6A(3), (4), (5) Employment of Foreign Workers Act (Cap 91A, 1997 Rev Ed); ss 57(9), (10), 57A(3), (4) Immigration Act (Cap 133, 1995 Rev Ed).

113 Sornarajah, *supra*, note 36.

114 *Supra*, note 6, at 438.

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