Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences Get a Home of their Own

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SAULT STE. MARIE, MENS REA AND THE HALFWAY HOUSE: PUBLIC WELFARE OFFENCES GET A HOME OF THEIR OWN

ALLAN C. HUTCHINSON*

I. INTRODUCTION

A continuing source of dissatisfaction in Canadian criminal law has been the uncertainty and confusion surrounding the status of absolute liability offences. Although this category of liability has been part of Anglo-Canadian law in one form or another for well over a century, relatively few steps have been taken by the courts to arrive at a clear and settled statement of its applicability and scope in the criminal process. As Brian Hogan notes, "there is no discernible pattern which enables the ordinary lawyer to predict with any measure of confidence whether a particular offence will be held to be one of [absolute] liability or not. Few areas of law have spawned so much litigation and so little of it is edifying." One of the greatest obstacles to

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1 The terms "strict liability" and "absolute liability" historically have been used, to varying degrees, in an interchangeable fashion. However, in a strict sense, "absolute liability" is a misnomer, as all the usual defences, such as duress or automatism, are available. See Smith and Hogan, Criminal Law (4th ed. London: Butterworths, 1978) at 79; Brett, An Inquiry into Criminal Guilt (Sydney: Law Book Co. of Australasia, 1963); Howard, Strict Responsibility (London: Sweet & Maxwell, 1963); and Mewett and Manning, Criminal Law (Toronto: Butterworths, 1978) at 122. Nevertheless, for reasons that will become clear, "absolute liability" will be used throughout this paper to refer to what is now known as "absolute" or "strict liability," and "strict liability" will take the particular meaning attached to it by the Supreme Court of Canada in this case.

2 The first move away from fault-based liability occurred in the middle of the nineteenth century in the cases of R. v. Woodrow (1846), 15 M. & W. 404, 153 E.R. 907 (Ex. Ct.); and R. v. Stephens, [1866] 1 Q.B. 702. This trend was reflected in other parts of the common law world such as the United States and Australasia. See Sayre, Public Welfare Offences (1933), 33 Colum. L. Rev. 55 at 62-67. As Howard notes, "the truth of the matter is that no one knows why the doctrine appeared when it did, or at all; we know only how it appeared." Supra note 1, at 13.

3 The courts have seemed content to decide each particular issue on its merits rather than attempt to fit the decision into some wider and more comprehensive context. Indeed, this piecemeal approach can be attributed to the tendency of the courts to subsume the problem under statutory interpretation. This serves simply to exacerbate the situation; see text accompanying notes 113-15, infra. Notwithstanding this, the legislature must take at least an equal portion of the responsibility for the existing state of affairs.

clarification lies in the inability or unwillingness of the courts to conceive of the problem other than in exclusive terms of full mens rea or absolute liability. All is darkness and light; there are no shades of grey. This restricted and polarized approach inevitably leads the courts into a difficult predicament, especially with regard to public welfare legislation:

If [the court] decides that the offence requires full mens rea, it may put an impossible burden on P and thereby virtually nullify the legislation. But if it decides that P need prove no mental element at all, it runs the risk of penalizing innocent and guilty alike to the detriment of justice and respect for law.

In recent years, however, the courts have taken a more responsive attitude and have been prepared to grapple with the problem. Attempts have been made to mediate the traditional polarity of approach. The result of this trend has been that the Supreme Court of Canada in R. v. City of Sault Ste. Marie has seen fit to introduce a third category of liability that lies between the requirement of full mens rea and the imposition of absolute liability. As such, the decision is a crucial one and holds wide-ranging implications for the whole field of criminal law. Accordingly, the purpose of this comment will be to measure the success the Court has had in clearing up the uncertainty and dissatisfaction surrounding absolute liability offences. However, while the reduction of uncertainty in the law is a laudable aim that must be given constant encouragement, especially in an area of law where liability is intended to be imposed without fault, it is not enough in and of itself.

3 For a discussion and definition of such legislation, see text accompanying note 66, infra.

6 Howard, Strict Responsibility in the High Court of Australia (1960), 76 L.Q. Rev. 547.

7 (1978), 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353 (S.C.C.). The Court was made up of Laskin C.J.C., Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

8 While this comment will concentrate on the implications of the decision for the criminal law, the decision is obviously of great significance for environmentalists. Their initial response is likely to be that any softening of the law or change that is likely to result in fewer convictions is a bad one. However, in reply, it can be said that the Court is simply bringing the law into line with practice. Evidence suggests that, in reality, those entrusted with enforcement are extremely reluctant to prosecute without there being some degree of fault on the part of the offender. For a thorough analysis of the problems of enforcement in public welfare offences, see Studies on Strict Liability (Ottawa: Law Reform Commission of Canada, 1974) at 63-151.

9 Although consistency and certainty in the law are eminently desirable for, as Edmund Burke noted, where certainty ends, injustice begins, this must not be allowed to take precedence over the substance and content of the rules. This problem is given a fresh, yet equally forceful, airing by Ehrlich and Posner:

The “chilling” of socially valuable behaviour by an uncertain law is a potentially serious problem whenever criminal penalties are involved . . . Not only do criminal sanctions tend to be severe (costly) but it is normally impossible to purchase insurance against criminal liability. The average individual can avoid the risk of being subjected to a criminal penalty only by avoiding criminal activity. But if what constitutes criminal activity is uncertain this is not enough: he can eliminate the risk only by avoiding, in addition to clearly criminal behaviour, all other behaviour that is within the penumbra of the vague standard. And he may very well do this, even though the penumbral activity is quite valuable privately as well as socially: a rational individual, especially if he is risk averse, may incur heavy costs to avoid even a slight risk of criminal punishment. Thus, the social costs of vague criminal standards might be high.

Mindful of this limitation, this paper will also consider whether the solution and scheme arrived at by the Court is a desirable one, in the sense of fitting into and promoting the primary goals and structure of criminal justice in general. Considering that around 90 percent of all offences outside the Criminal Code impose some form of absolute liability and that, on average, at least one in twenty-five Canadians is convicted of such an offence each year, the decision is not just grist for the academic mill. Its effect upon the actual administration and enforcement of law is manifest. Accordingly, the decision provides an opportunity to explore more fully some of the central issues raised and to consider the role that the court perceives for itself in such matters. In order to achieve such an objective, and for ease and clarity of debate, it is convenient to divide discussion into four main categories: a thorough analysis of the case and its handling of existing authorities; the doctrinal issues surrounding the validity and acceptability of absolute liability in an overall scheme of mens rea; the precise nature and scope of this new middle ground of liability; and the method of categorisation to be used in assigning particular offences to the appropriate level of liability.

II. THE CASE

The factual circumstances of the case are of an entirely unremarkable and prosaic nature, although they do concern the very real and pressing problem of pollution control. In November, 1970, the City of Sault Ste. Marie entered into an agreement with Cherokee Disposal and Construction Co. Ltd. to dispose of all the city's refuse. As a direct result of the methods of disposal used by the company, the Root River and Cannon Creek became polluted. The company was charged and convicted under section 32(1) of The Ontario Water Resources Act. The question arose whether the City should also be convicted under the same section:

(Every municipality or person that discharges or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water ... that may impair the quality of water, is guilty of an offence and, on summary conviction, is liable on first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than $10,000, or to imprisonment for a term of not more than one year, or to both fine and imprisonment.

From such humble beginnings, the case managed to find its way through five courts, including the Supreme Court of Canada, and became something of a cause célèbre. Its passage through the various courts is indicative of the prevailing confusion, and the case provides an excellent illustration of the limited approach that has characterized and plagued the development of the law in this area. Each court felt obliged to take the overly simplistic view that either full mens rea was required or no mens rea was required at all.

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10 These figures are based on research carried out by Fitzgerald and Elton, "The Size of the Problem," in Studies on Strict Liability, supra note 8, at 41-61.
11 See Anisman, Water Pollution Control in Ontario (1971-72), 5 Ottawa L. Rev. 342.
13 R.S.O. 1970, c. 332, s. 32(1).
None of the lower courts felt able or sufficiently confident to tread some middle ground.

At first instance in the Provincial Court (Criminal Division), Judge Greco dismissed the information laid, as the City had had nothing to do with the actual disposal activities. On an appeal de novo, Judge Vannini reversed the decision and convicted the City. He held that mens rea was not an essential ingredient of the offence and that the City could commit such an offence in a vicarious capacity. In the Divisional Court, the conviction was set aside. In reaching this decision, the Court relied upon the fact that the charge was bad for duplicity. However, the Court did feel that the problem of whether the offence required mens rea or not was of sufficient importance to warrant further consideration. After a workmanlike survey of the relevant law, the Court decided that the offence was not one of absolute liability and that proof of mens rea was required:

As far as the general subject-matter of s. 32(1) of the Ontario Water Resources Act is concerned, we accept without reservation that the prohibition of water pollution is in “the interests of health, convenience, safety and general welfare” and hence fit and proper subject-matter for categorization as an offence of [absolute] liability .... It is our view that the offence of discharging or depositing impairing material is one of [absolute] liability. However, we do not think that the general subject-matter of the legislation, in itself, has this result with respect to the “permitting” offence.

On a further appeal to the Ontario Court of Appeal, it was held that the conviction could not be quashed on the issue of duplicity, as the matter had not been raised in the original trial at first instance. Nonetheless, the Court did agree that mens rea was an essential ingredient of the offence. Further, a majority of the Court, Lacourcière J.A. dissenting, was of the opinion that there was insufficient evidence to establish the necessary degree of mens rea and, therefore, ordered a new trial. In response to this unsatisfactory train of hearings, the Supreme Court of Canada, mindful of the important legal issues to be resolved, granted leave to the Crown to appeal and to the City to cross-appeal.

In a unanimous judgment, delivered by Dickson J., the Supreme Court of Canada dismissed both appeals and ordered a new trial. The Court did not feel itself bound by the traditional and polarized approach to the question of liability and the degree of mens rea required for any particular offence. Adopting a scheme suggested by Estey C.J.H.C. in his dissenting judgment in

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14 (1975), 13 O.R. (2d) 113, 30 C.C.C. (2d) 257 (Div. Ct.).
15 The Supreme Court finally decided that the charge was not bad for duplicity as “causing” and “permitting” were held simply to be different modes of committing the same offence, namely, pollution of the river. See supra note 7, at 167-70 (D.L.R.), 359-62 (C.C.C.).
16 Supra note 14, at 125 (O.R.), 269 (C.C.C.) per Morden J.
17 (1976), 13 O.R. (2d) 139, 30 C.C.C. (2d) 283 (Brooke, Lacourcière and Howland J.J.A.).
18 Id. at 140-56 (O.R.), 284-300 (C.C.C.).
19 A motion for leave to appeal to the Supreme Court of Canada (Laskin C.J.C., Ritchie and Spence J.J.) was granted on November 1, 1976.
Public Welfare Offences

R. v. Hickey,20 the Court replaced the existing dual basis of liability with a three-tiered structure of liability:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular events. These offences may properly be called offences of strict liability.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.21

Although the Court claimed to rely upon and follow “an increasing and impressive stream of authority” in arriving at this decision to establish a defence of due diligence,22 its handling of those authorities leaves much to be desired and falls short of the standards expected of a system’s highest appellate court. For the purposes of this paper, the Court’s treatment of earlier cases can be dealt with in three segments. First of all, the Court placed great weight on a series of decisions in lower courts which, in recent years, it had studiously ignored23 or steadfastly refused to follow. For instance, as early as 1923, in R. v. Regina Cold Storage & Forwarding Co.,24 a case involving unlawful possession of liquor, Haultain C.J. favoured the position that the “absence of mens rea means an honest and reasonable belief by the accused in the existence of facts which, if true, would make the act charged against him innocent.”25 A similar line was taken thirty years later by Sheppard J. in R. v. Laroque.26 More recently in McIver27 and Custeau,28 MacKay J.A. categorized careless driving as an offence of absolute liability, but held that it was

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20 (1976), 12 O.R. (2d) 578, 68 D.L.R. (3d) 88, 29 C.C.C. (2d) 23 (Ont. H.C.), rev’d (1977), 13 O.R. (2d) 228, 70 D.L.R. 689 (Ont. C.A.). It must be remembered that Estey J. was a member of the Supreme Court in the case under discussion.
21 Supra note 7, at 181 (D.L.R.), 373 (C.C.C.).
22 Id. at 172 (D.L.R.), 364 (C.C.C.).
27 Supra note 23.
open to the accused to show that [actus reus] occurred without fault or negligence on his part. Furthermore, there has been a series of cases under section 32(1) of The Ontario Water Resources Act, the section at issue in the case under discussion. In a comprehensive review of these cases, Professor Jobson claims that the courts have "openly acknowledged a defence based on lack of fault or neglect: these cases require proof of the actus reus but then permit the accused to show that he was without fault or had no opportunity to prevent the harm."

However, this stream of authority does not flow unchecked, and there is a flood of cases in which the courts have chosen not to consider the possibility or validity of some middle ground of liability. In the Supreme Court of Canada, there has been a quintet of leading cases in which the problem of absolute liability has arisen and, in each instance, the court has construed the matter in traditionally dichotomous terms and refrained from addressing itself to the viability of an intermediate option. The efforts of the Court to distinguish these decisions, which might with more integrity have been simply overruled, forms the second ground of complaint. In particular, the Court made an ineffectual attempt to interpret narrowly its most recent decisions, in Pierce Fisheries and Hill, so that they could not be said to be dispositive of the question of absolute liability offences, and so that they did not stand in the way of the introduction of some middle ground.

In Pierce Fisheries, the defendant company was charged with being in possession of undersized lobsters contrary to section 3(1)(b) of the Lobster Fisheries Regulations, made under the Fisheries Act. The Court, by a majority of eight to one, reversing the decision of the Nova Scotia Supreme Court Appeal Division, held that mens rea was not an essential ingredient of the offence and ordered the case to be remitted for conviction. The Court quoted with approval the dicta of Roach J.A. in R. v. Pee-Kay Smallwares Ltd.:

If on a prosecution for the offences created by the Act, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such evil intent, the courts have simply overruled cases such as R. v. Rees, supra note 24; Beaver v. The Queen, [1957] S.C.R. 531, 118 C.C.C. 129; R. v. King, [1962] S.C.R. 746, 35 D.L.R. (2d) 386; R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5, 12 C.R.N.S. 272; and Hill v. The Queen, [1975] 2 S.C.R. 402, 24 C.R.N.S. 297. See text accompanying notes 54 and 55, infra.

See text accompanying notes 54 and 55, infra.

31 Jobson, Far From Clear (1976), 18 Crim. L.Q. 294 at 297.

32 To produce a list would not only be a lengthy process, but would serve no real purpose. Suffice it to say that, apart from those cases listed by the Supreme Court and a few other instances, all reported cases have taken such a polarized approach.


34 See text accompanying notes 54 and 55, infra.

35 Supra note 33.

36 Id.

37 P.C. 1963-745, SOR/63-173, made pursuant to s. 34 of the Fisheries Act, R.S.C. 1952, c. 119.

intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve.\footnote{[1948] 1 D.L.R. 235 at 243, 90 C.C.C. 129 at 137 (Ont. C.A.).}

The Court decided that the true ratio of Pierce Fisheries was simply that, in such offences, the Crown did not have to prove mens rea. Although the particular facts in Pierce Fisheries made it unnecessary to decide whether the defendant company had acted with due diligence,\footnote{As the company dealt in such vast amounts of lobsters and the employees had been specifically instructed not to deal in undersized lobsters, it would have been extremely difficult to show lack of diligence. As the majority stated, "If lack of knowledge by any responsible employee constituted a defence for a limited company to a charge under s. 3(1) (b) of the Regulations, then I think it would in many cases be virtually impossible to secure a conviction." Pierce Fisheries, supra note 33, at 22 (S.C.R.), 286 (C.R.N.S.).} the decision did not rule out the possibility of a defence of reasonable care. For instance, it is likely that the defendant company would have escaped conviction if they could have shown that they had done everything possible to discover the presence of undersized lobsters. Although this represents a not unreasonable interpretation,\footnote{Such an interpretation was taken by, inter alia, the Law Reform Commission of Canada. See Studies on Strict Liability, supra note 8, at 164.} it is clear from the terms used and analysis made by the Court that absolute liability was firmly in the minds of the judges when arriving at their decision.

As regards the decision in Hill,\footnote{Supra note 33.} the arguments employed by the Court to get around it are tenuous at best. It was held by a majority of seven to two that the offence of leaving the scene of an accident\footnote{Ontario Highway Traffic Act, R.S.O. 1970, c. 202, s. 140(1) (a).} can be committed even though the accused honestly thought no damage had been caused. In reaching its decision, the Court expressly relied upon Pierce Fisheries\footnote{Supra note 33.} and construed it as imposing strict liability.\footnote{Hill v. The Queen, supra note 33, at 408-09 (S.C.R.), 302 (C.R.N.S.) per Dickson J.} In Sault Ste. Marie, however, the Court did not feel that this decision stood in the way of a possible defence of reasonable care:

In Hill, the appellant was charged under the Highway Traffic Act with failing to remain at the scene of an accident. Her car had "touched" the rear of another vehicle. She did not stop, but drove off, believing no damage had been done. This Court affirmed the conviction, holding that the offence was not one requiring mens rea. In that case the essential fact was that an accident had occurred, to the knowledge of Mrs. Hill. Any belief that she might have held as to the extent of the damage could not obliterate that fact, or make it appear that she had reasonable grounds for believing in a state of facts which, if true, would have constituted a defence to the charge. The case does not stand in the way of a defence of reasonable care in a proper case.\footnote{Supra note 7, at 180 (D.L.R.), 372 (C.C.C.).}

Such a bald assertion is extremely difficult to justify without more, especially when one considers that the decision has already been given a clear interpre-
tation as imposing absolute liability\(^4\) and that Dickson J. delivered the judgment of the Court in both cases. On this particular point, the sincerity and integrity of the reasoning employed is seriously challenged.

Also, in its search to find a respectable quantity and quality of authority to justify the introduction of this middle ground of liability, the Court did not confine itself solely to the body of Canadian authorities, and felt constrained to turn to other Commonwealth jurisdictions. This unnecessary dependence on foreign decisions to bolster and justify its own decision amounts to the third ground of objection. However, this criticism is aimed not at the practice of considering the approaches of foreign jurisdictions to similar problems in Canada, which is profitable and instructive, but at the habit of utilizing foreign authority purely to give technical validity and support to a solution favoured by a Canadian court. Such insecurity stands in the way of a fully matured and individual model of judicial philosophy being developed by the Supreme Court to fit the needs and special interests of Canada, as opposed to depending on a largely uncritical distillation of foreign models of judicial activity. Notwithstanding this, the Court found the most favourable encouragement in an established line of antipodean authorities. In Australia, building on the initial work done in *Maher v. Musson*\(^4\) and *Proudman v. Dayman*,\(^4\) the courts have developed the rule that, if it is sufficiently clear that a statute does not require proof of *mens rea*, the burden of proof shifts to the defendant to show, on a balance of probabilities, that there was a reasonable mistake or that reasonable care had been taken.\(^5\) This principle has also found acceptance in New Zealand.\(^6\) Further, the Supreme Court of Canada looked to developments in England and felt able to record a favourable response to the suggestion of a "halfway house." Although the Court may not have intended it, the impression given is that such an innovation forms part of English law. Unfortunately, this is not the case, for the reserved enthusiasm of a small number of law lords in *Sweet v. Parsley*\(^5\) cannot be taken to represent the prevailing view of the judicial establishment, and any reliance by the Court on such patently *obiter* statements is ill-founded.

Although the Court's reasoning is strained and far from being entirely satisfactory, there is little to be gained from any protracted discussion of whether there was a sufficient precedential base on which the Court could rest its decision. While the Court might traditionally be considered still to

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\(^5\) (1934), 52 C.L.R. 100 (Aust. H.C.).

\(^6\) (1941), 67 C.L.R. 536 (Aust. H.C.).

\(^5\) See, generally, Howard, *supra* note 6. In a recent report by The Criminal Law and Penal Methods Reform Committee of South Australia, entitled *The Substantive Criminal Law* (1977), it was recommended that negligence as a basis of liability should be retained in summary offences only; see, generally, at 340-54; and Annot. (1978), 4 C.L.B. 614.


be bound technically by its own earlier decisions,\textsuperscript{53} it seems to be agreed on most sides\textsuperscript{54} that the Court can and will\textsuperscript{55} refuse to follow and, if need be, depart from prior decisions when the appropriate circumstances present themselves and compelling considerations of policy so dictate; "although the Supreme Court's past devotion was to precedent, its future commitment must surely be to policy."\textsuperscript{56} Indeed, the Court itself has emphasized, although in mostly obiter statements, that it would not be fulfilling its role adequately as the highest appellate court if it maintained a slavish and mechanical adherence to the doctrine of \textit{stare decisis}. As Chief Justice Laskin recently noted:

This Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decisions . . . . I do not have to call upon pronouncements of members of this Court that we are free to depart from previous decisions . . . . [T]his Court has not shown itself to be timorous in tackling important issues where it could be said, with some justification, that an important consideration was absent from an earlier judgment, even a recent one, upon which reliance was placed to foreclose examination of a similar issue in a subsequent case.\textsuperscript{57}

Accordingly, the remainder of this comment will not concern itself with the fruitless task of determining whether the past record of the Court in dealing with absolute liability offences enables or justifies the Court in reaching the decision it did in the present case. It is much more profitable to concentrate upon the desirability of the decision and its likely implications for and effects


Also, in an unpublished address to the University of Saskatchewan, \textit{infra} note 61, Mr. Justice Dickson, speaking in a personal capacity, said:

Under a strict rule of \textit{stare decisis}, judges were duty-bound to search for and follow existing judicial precedent to govern the cases before them, even though, as Lord Denning has said that meant: "Stand by your decisions and the decisions of your predecessors, however wrong they are and whatever injustice they inflict." At present, most of the supreme courts in the world, including the Supreme Court of Canada, feel themselves at liberty to reconsider their earlier decisions and depart from previous doctrine if convinced that that doctrine is plainly wrong.


\textsuperscript{56} MacGuigan, \textit{ supra} note 54, at 665.

upon the future. One hopes it may result in the more successful structuring and administering of absolute liability offences.

III. THE DOCTRINE OF MENS REA

The members of the Supreme Court have not been in the habit of making explicit or articulating the major doctrinal premises on which they rest their more particularized principles of law. Furthermore, they have seemed not only indifferent to the need for such exposition, but also positively unwilling to enter into any discourse on the theoretical generalizations that underpin and shape their response to individual cases. Consequently, any attempt to unmask the essential core of jurisprudential assumptions that lies at the heart of every decision has been, of necessity, one of conjecture and intuitive supposition. For a court that is becoming increasingly involved in questions of general policy and values, this state of affairs is to be deplored. However, in recent years, there are signs that the Court has started to overcome some of its traditional reticence and reluctance in such matters. The Court has made the first tentative moves in making good its earlier deficiencies and has become more disposed to explicate its crucial theoretical stance on important doctrinal issues, such as the nature and purpose of the law, the motive forces and dynamics of judicial decision making, and its own role in the overall legal and political system. There now seems to be a growing awareness of the

58 As F.S.C. Northrop commented, “in law, as in all other things, we shall find that the only difference between a person without a philosophy and someone with a philosophy is that the latter knows what his philosophy is, and is, therefore, more able to make clear and justify the premises that are implicit in his statement of the facts of his experience and his judgments about those facts”; The Complexity of Legal and Ethical Experience (Boston; Little, Brown, 1959) at 6. However, many judges maintain that it is not part of their function to build up and articulate a coherent philosophy. As Lord MacMillan opined, “[y]our Lordships’ task in this House is to decide particular cases between litigants and your Lordships are not called on to rationalise the law of England. That attractive, if perilous, field may well be left to other hands to cultivate”; Read v. J. Lyons & Co., [1947] A.C. 156 at 175, [1946] 2 All E.R. 471 at 478. Also, Professor Mewitt makes the rather myopic statement that recent academic observations fail “to recognize that law suits are attempts to resolve disputes between parties by the submitting of issues to an impartial arbiter. They are not, nor should they be, excuses for introducing into the realm of law-making mere jurisprudential discussion. See Criminal Law (Toronto: Butterworths, 1978) at 115. For a classic analysis of the approach of the Supreme Court to the problem of the mental element in criminal law, see Weiler, The Supreme Court of Canada and the Doctrine of Mens Rea (1971), 49 Can. B. Rev. 280

59 The most striking example of this is the reasoning, if not the actual result, in Harrison v. Carswell, supra note 57.

60 It is plausible that the pleas of a number of academics might have, at least, encouraged such a fresh approach; see Coval and Smith, supra note 54 and Weiler, supra note 54.

61 Along with Chief Justice Laskin, Mr. Justice Dickson is in the vanguard of such a movement. For instance in an unpublished address at the University of Saskatchewan on May 19, 1978, he expressed some of his personal views on the role of policy in judicial decision-making. He felt that the Supreme Court was “at the threshold of a new era of judicial decision-making” in its efforts to balance the conflicting demands of stability and change. Relieved of pressures created by a strict application of stare decisis, see supra note 54, he perceived the Court as being “an appropriate forum in which to pursue social goals . . . and to contribute to the orderly evaluation of society.” Although
need to become more reflective, and there appears to be a greater readiness to develop a keener and more conscious appreciation of “the policies and principles embedded beneath the surface of the rules.” Although the doctrinal and theoretical discussion of the place, if any, of absolute liability in the general scheme of criminal liability is by no means as full or as extensive as it might be, the decision in Sault Ste. Marie nevertheless marks a further, if small, step forward in this incipient and enlightened trend. Whatever other failings the decision might have, it merits warm praise in this particular context.

It must be made clear from the outset that the Court restricted its observations on the concept of absolute liability to those offences referred to as “public welfare” or “regulatory” ones. It does not purport to make any inroad into or attempt to derogate from the Blackstonian principle that lies at the core of the criminal law, namely, that “to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will.” Accordingly, the thrust of the whole

the Court must not attempt to usurp the function of the legislature, he thought that there were ample instances in which the Court could adopt such an activist and creative approach. In particular, he drew attention to the areas of criminal and environmental law:

In criminal law, there is the renewed concern for individual rights and protection of privacy in the face of new technological advances on the part of both those who break the law, and those who are to enforce it. In environmental law, both large and small-scale, there is great concern to give appropriate weight to ecological factors without foreclosing development of needed public works and
decision rests upon a crucial, yet incompletely sketched, distinction being made between the true criminal offence and the public welfare offence:

[Public welfare offences] are not criminal in any real sense, but are prohibited in the public interest: Sherras v. De Rutzen, [1895] Q.B. 918. Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like.  

Even at such an early stage in its discussion, this statement by the Court, as well as being a very inadequate definition of what amounts to a "public welfare offence," prompts a substantial criticism of a most rudimentary and fundamental nature. Although the Court recognizes and claims to rest its decision on this crucial distinction, it fails to follow through upon the true significance and implication of such a distinction. If such offences are more accurately and happily described as civil ones, then nothing can be gained from attempting to find them a place in the existing framework of the criminal law. To dress up such offences in the trappings of the modern criminal law is to exacerbate an already troubled situation. The fact that such offences are heard in the criminal courts is more a result of historical accident than contemporary design. Consequently, the Court must have the courage of its convictions and treat such offences as sui generis. Ideally, they should be taken out of the criminal courts and placed in the more suitable environment of the administrative process. Such a decisive move could only be made by the legislature.

Maintaining this distinction between true crimes and public welfare offences, and yet, at the same time, striving to fit such offences, in a neat and compatible manner, within the structure of criminal liability, the Court proceeded to a consideration of the various competing interests and values at play in the area of "public welfare offences":

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

The reasons and rationale used to justify the imposition of absolute liability in such offences have been fully rehearsed. There are two main strands in these arguments: greater administrative efficiency and improved standards of prevention. It is argued that as the likelihood and extent of risk to social and public interests increase, so the need for mens rea decreases. The interests of society take legitimate precedence over those of the individual: "[J]ustice to the individual is rightly outweighed by the larger interests on the other side of the scales." If, for instance, a corporation voluntarily engages in an activity that puts the community at risk, then the corporation should be liable for any harm that ensues and must accept the possibility of the consequences turning out worse than they expected. In this way, the entrepreneur becomes the compulsory and comprehensive insurer of the public against the risk created. Such a state of affairs, it is argued, will create a great incentive to take all conceivable preventative steps. Also, it would deter all but the most competent from engaging in such potentially hazardous activities. The central force of such arguments is well brought out by Paul Weiler:

Public welfare offences regulate conduct that is a considerable distance removed from any harm to any individual, and thus the retributive urges in the area are muted. The conduct is prohibited by laws of relatively recent origin and there is a relatively artificial line between illegal behaviour and legitimate business dealings. Hence, there is much less of an aura of popular moral attitudes surrounding the offence and little likelihood of public stigma in a conviction. This is reflected in the fact that the almost invariable sentence for the offence will be a fine imposed on the firm, not a jail sentence on an individual. The firm has chosen to engage in business where these regulatory laws apply. It can be required to treat the amount of these fines as a cost of doing business and made to adjust its affairs accordingly.

The second strand of the justificatory rationale for absolute liability is that of greater administrative efficiency. It is argued that the cost, difficulty and inconvenience of having the Crown prove mens rea would unduly hamper the efficient administration of the courts and heap an unnecessary amount of work on an already overworked court system. In short, the imposition of absolute liability responds to the system's growing concern for the spiralling costs of procedure in cases where it is too expensive, or even impossible, to prove fault, considering the gravity of harm involved. The potential cost of litigation is accorded greater weight than a possible wrong conviction. On
such a view, the relationship between the substance of crimes and the procedural context in which they operate is much deeper and of a more intimate nature than is often admitted.\textsuperscript{72} As Professor Sayre declared:

It is needless to point out that, swamped with such appalling inundations of cases of petty violations, the lower criminal courts would be physically unable to examine the subjective intent of each defendant, even were such determination desirable. As a matter of fact it is not; for the penalty in such cases is so slight that the courts can afford to disregard the individual in protecting the social interest.\textsuperscript{73}

The main thrust, therefore, of such justificatory arguments is that a brand of philosophical calculus must be applied and a decision made as to whether the interests and protection of society outweigh the interests and possible injustice to one individual member of that society:

In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.\textsuperscript{74}

Although respecting and sympathizing with such sentiments, the Court was not persuaded and felt that “arguments of greater force are advanced against absolute liability.”\textsuperscript{75} In effect, these arguments are quite simply the other side of the coin, and they directly challenge the validity of the arguments used to support the imposition of absolute liability. First, the Court maintained that, in spite of the weighty and unignorable interest of society, absolute liability too greatly eroded and cut into the fundamental principles of criminal liability. The price of absolute liability is too high and is bought at too great a cost to individual liberty and freedom. The identity and personality of the individual becomes unduly submerged beneath the rising tide of impersonal and aggregate interests. As George Fletcher delightfully remarks, “the utilitarian calculus is too commodious a crucible for resolving concrete problems of mistakes of law.”\textsuperscript{76}

A more substantive and practical argument employed against the imposition of absolute liability is that it could well prove to be counter-productive and actually increase cynicism and disrespect for law. There is and can be no empirical demonstration of the claim that absolute liability will result in greater care being taken. Indeed, the opposite is likely. If a trading concern is punished regardless of fault, it will soon come to regard fines as an unavoidable loss and will simply write them off as a necessary and routine part of

\textsuperscript{72} Indeed, as Professor Packer notes, “[t]he problems of administration are inseparable from the problem of what is or ought to be the substance of what is being administered. Indeed, the character of the processes of criminal justice is formed by the substantive tasks allotted to them.” \textit{The Model Penal Code and Beyond} (1963), 63 Colum. L. Rev. 594 at 604.

\textsuperscript{73} \textit{Supra} note 66, at 69-70.


\textsuperscript{75} \textit{Id.}

\textsuperscript{76} Fletcher, \textit{supra} note 63, at 733.
business expenditure. In such circumstances, the incentive to lay out money and time to prevent pollution or to encourage research into the technology of pollution prevention will be reduced. Such an unhealthy situation, created by the imposition of no-fault liability, is more than likely to lead to a serious and crippling reduction in the law’s success as a preventive and inspirational force.

Finally, the Court remained unconvinced by arguments based on greater administrative efficiency. Undesirous of elevating administrative efficiency above wider considerations of justice and due process, the Court did not feel constrained to attach much importance to such arguments:

The administrative argument has little force. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt. Additionally, it may be noted that s. 198 of the Alberta Highway Traffic Act, R.S.A. 1970, c. 169, provides that upon a person being charged

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77 See Williams, supra note 70, at 907-08.

78 An application of the presently favoured “economic perspective,” as represented by Richard A. Posner and other members of the so-called Chicago School, to the problem offers some interesting insights into the relative efficiency and efficacy of strict liability and negligence as methods of combating the type of harm and safeguarding the interests that public welfare offences are intended to protect. According to such an analysis, where the primary object of an offence is accident prevention, as is the case with public welfare offences, there is little to choose between strict liability and negligence. Whichever basis of liability is employed, the standard of care taken by the potential injurer is likely to be influenced almost exclusively by the result of balancing the cost of precautions against the predicted cost of the penalty. If the preventive costs are lower, then precautions will be taken whether the offence is one of negligence or strict liability. But if the penalty is lower, then neither negligence nor strict liability is likely to encourage the taking of precautions. Therefore, the choice of liability standards has no effect on the level of safety achieved. Moreover, it is possible, yet surprising to many, that, if either basis of liability is to bring about some long term effect, the imposition of strict liability is more likely than negligence to result in an improvement in accident prevention. As regards negligence, liability is usually determined on the existing state of sophistication of the technology of accident prevention and, as such, presents little or no incentive to advance such knowledge by investing in its research and development. On the other hand, strict liability may engender greater safety, as there is more of an incentive to encourage and engage in the research into and the development of precautionary measures:

If [defendants] were liable for all accidents . . . , it would compare the liability that it could not avoid by means of existing safety precautions with the feasibility of developing new precautions that would reduce that liability. If safety research and development seemed likely to reduce accident costs by more than the cost of research and development, the [defendant] would undertake it . . .


Such an approach is overly simplistic. The validity of the argument is contingent on two dubious assumptions: that penalties will remain minimal and unrealistic, and that the intangible costs (i.e., loss of reputation in the community, political embarrassment, unsettling of shareholders) will be negligible. Moreover, it fails to take into account the possible and positive gains that are available if the polluter shows himself to be a morally and socially responsible member of the community. There is much more to law and life than the cold and relentless logic of economic reasoning.

with an offence under this Act, if the Judge trying the case is of the opinion that the offence (a) was committed wholly by accident or misadventure and without negligence, and (b) could not by the exercise of reasonable care or precaution have been avoided, the Judge may dismiss the case. See also, s. 230(2) [am. 1976, c. 62, s. 48] of the Manitoba Highway Traffic Act, R.S.M. 1970, c. H60, which has a similar effect. In these instances at least, the Legislature has indicated that administrative efficiency does not foreclose inquiry as to fault. It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interests of health and safety was minor, $20 or $25; today, it may amount to thousands of dollars and entail the possibility of imprisonment for a second conviction. 80

In rejecting the theoretical basis for absolute liability, the Court emphasized, however, that this did not mean that they automatically embraced the idea that full mens rea must be an indispensable element of every offence. It would, in both practice and theory, be ill-advised to reach such a conclusion. Consequently, the possibility of some middle ground being taken presented itself as an attractive and appropriate solution to the problem. Furthermore, by plotting such a course, the Court was able to accord sufficient weight and importance to the promotion of public health and safety, and, at the same time, devise some method to encompass the “thoughtless and inefficient” 81 without snaring the diligent and socially responsible. In arriving at such a conclusion, the Court deserves to be warmly applauded and the results of its discussion can be willingly approved and endorsed. Yet this does not complete the work of the Court. There still remains the considerable problem of giving substance to and delineating the exact boundaries of this freshly inhabited middle ground.

Before proceeding to inspect this newly developed “halfway house” of liability, it is worthwhile to take a brief glance at a problem that caused the Court some momentary concern, a problem that touches upon the difficult question of the precise role of the Supreme Court in the overall law-making process. Their uncertainty concerned the issue of whether the introduction of some middle ground fell more correctly into the sphere of legislative enactment rather than within the scope of judicial action. In short, was the judiciary encroaching upon a legitimate area of control and responsibility of the representative arm of the legal system? Although the response of the Court to this dilemma is likely to receive general approval, the rationale relied upon by the Court is not entirely convincing or adequate, especially when seen in the light of the more cogent and sophisticated arguments at its disposal:

It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that the concept of absolute liability and the creation of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature. The development to date of this defence, in the numerous decisions I have referred to, of Courts in this country as well as in Australia and New Zealand, has also been the work of Judges. The present case offers the opportunity of consolidating and clarifying the doctrine. 82

While it is the responsibility of the legislature to devise and decide upon

81 Pound, Spirit of the Common Law (Boston: Marshall Jones, 1921) at 52,
a scheme of policy suited to the demands of the particular society at any given
time, it is the job of the courts to fit such a scheme into the existing legal
framework and to ensure a smooth and fair application of such policy in the
individual case. This is especially so in the field of criminal law where all
offences must be created by the legislature. However, legislative policies are
generally enacted on the assumption that the traditionally formulated rules
relating to individual responsibility and general defences will apply. Accord-
ingly, it seems reasonable to suggest that the creative development of these
underlying rules is best suited to the judicial rather than the legislative institu-
tions of the legal system. Yet this does not mean that the courts can go
about this process in a completely unfettered manner and without taking due
note of the direction that the legislature is taking in policy matters. Paul
Weiler captures the essential character of the problem to be faced, particu-
larly by the Supreme Court:

Even if we are not overly concerned with the absolute restraints of judicial pre-
cedent, the court must respect the legislative will when the latter has spoken. To
some extent, statutory language usually enacted on the basis of a nineteenth
century perception of the mens rea problem, may have frozen the process of
development and artificially precluded the judicial creation of a coherent and
rational body of law in the area. Hence the Supreme Court is continually faced
here with a delicate question in the theory of statutory interpretation—how clear
a statement it would require from a legislature before acquiescing in a departure
from the basic legal principle which animates the whole area of law, both statu-
tory and judge-made.

Nevertheless, to reduce all the problems in this area to the one problem of
statutory interpretation is to oversimplify the situation. The process of sta-
tutory interpretation is by no means a purely mechanical or value-free opera-
tion. It is impregnated with a host of value-based and result-oriented devices,
as the resolution of the present case reveals.

IV. THE HALFWAY HOUSE

Before making any critical comments upon this via media between full
mens rea and absolute liability that the Court chose to follow, it is vital that
the way in which this new category of liability will work should be clearly
understood. First, the Crown must prove the actus reus of the offence to the
satisfaction of the court, that is, beyond reasonable doubt. If the Crown is
able to do this, two possible courses of action may follow:

A. If the defendant chooses to remain silent or does not wish to put any
evidence before the court, it will be assumed that he acted without
due diligence and a conviction will be registered. There is no onus
upon the Crown to prove that the defendant acted negligently; or

83 See Weiler, Two Models of Judicial Decision-making (1968), 46 Can. B. Rev.
84 Weiler, supra note 58, at 284.
85 See text accompanying notes 141 and 142, infra.
86 It is feasible that such evidence may be present or, at least, implied in the Crown's
presentation of its case.
B. The defendant may adduce evidence to show that he was not negligent, but, on the contrary, acted with all due diligence. The burden of proving such an issue lies on the defendant. This is commonly referred to as "a reversed onus of proof", whereby the defendant must show on a balance of probabilities that he acted with due diligence rather than in a negligent manner.

It must be remembered, and is of paramount importance, that if, at the end of the day, the defendant is unable to show that it is more likely than not that he acted with due diligence, then the court must decide in favour of the Crown and a conviction is to be registered. This middle ground of liability, therefore, rests upon two central pillars: an available defence of due diligence and a shifting of the burden of proof. In effect, the Court endorsed and gave legal force to the recommendations of the Law Reform Commission of Canada:

The correct approach is to relieve the Crown of the burden of proving mens rea .... It is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever while the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

The introduction of a defence of reasonable care, thereby creating an offence of negligence, is of great theoretical significance. It effects a move in the basis of liability from the traditional view of punishing only fault-based activities to the essentially different ground of imposing criminal sanctions for merely negligent behaviour. Indeed, it is a moot point whether negligence can be legitimately classified as a species of mens rea. Notwithstanding this point of some philosophical nicety, the Court seemed satisfied to extend liability based on negligence to public welfare offences. However, although

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87 Although not all "reverse onus" provisions require proof on a balance of probabilities, such a label has been generally affixed to a burden and quantum of proof of this nature: see Cross, Evidence (4th ed. London: Butterworths, 1974) at 73-88, esp. at 80; Phipson, On Evidence, ed. Buzzard, et al. (12th ed. London: Sweet & Maxwell, 1976) at 36-47; Schiff, Evidence in the Litigation Process (Toronto: Carswell, 1978) at 1077-1111.


such liability is a common feature of much statute law, it remains pertinent to ask the extent to which negligence is a suitable standard of conduct to control such activities.

One of the problems involved in the introduction of a defence based on negligence is the difficulty inherent in applying a test based on reasonableness. In short, it resurrects the perennial debate over the suitability and desirability of objective or subjective standards. While objective liability may result in injustice in specific instances, subjective liability is impolitic and is likely to lead to a less responsible and reflective attitude being taken by the individual, thereby taking away the spur to maintain and improve the quality of care taken. For instance, while an external and impersonal standard may be appropriate and fitting in the case of a large corporate conglomerate or municipality, it may work harsh injustice on the defendant who has less knowledge and foresight than the reasonable man. As Jobson remarked with mock profundity, “the company can hire men of foresight: the naturally dull citizen is stuck with God’s endowment.” Indeed, any balanced scheme of liability must be concerned about not only whether an individual reached the standard of the reasonable man, but also whether he ever had the capacity to do so. In the converse situation, it would seem eminently fair to expect and demand that the large company take extra-special precautions, if one considers the vast resources and knowledge at its disposal. Moreover, the fact that a company voluntarily enters into a profit-making enterprise that puts social interests at serious risk surely means that it should bear a level of responsibility and accountability commensurate to that risk. Unfortunately, the courts have not warmed to the idea of a variable standard of negligence and, in Sault Ste. Marie, the Court did not concern itself with the matter, but

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91 Aeronautics Act, R.S.C. 1970, c. A-3, s. 17; Canada Dairy Commission Act, R.S.C. 1970, c. C-7, s. 21(3); Immigration Act, R.S.C. 1970, c. I-2, s. 49; Defence Production Act, R.S.C. 1970, c. D-2, ss. 21(5), 22; Estate Tax Act, R.S.C. 1970, c. E-9, s. 50(3); Export and Import Act, R.S.C. 1970, c. E-17, ss. 20, 21; Fresh Water Fish Marketing Act, R.S.C. 1970, c. F-13, s. 30(2); Oil and Gas Production and Conservation Act, R.S.C. 1970, c. O-4, s. 52; Pest Control Products Act, R.S.C. 1970, c. P-10, s. 10(2); Pesticide Compensation Act, R.S.C. 1970, c. P-11, s. 9(2); Plant Quarantine Act, R.S.C. 1970, c. P-13, s. 10(2); Proprietary or Patent Medicine Act, R.S.C. 1970, c. P-25, s. 17(1); Canada Shipping Act, R.S.C. 1970, c. S-9, s. 657; Arctic Waters Pollution Prevention Act, R.S.C. 1970 (1st Supp.), c. 2, s. 20(1); Canada Waters Act, R.S.C. 1970 (1st Supp.), c. 5, s. 31; Motor Vehicle Safety Act, R.S.C. 1970 (1st Supp.), c. 26, s. 18(1); Northern Inland Waters Act, R.S.C. 1970 (1st Supp.), c. 28, s. 35; Radiation Emitting Devices Act, R.S.C. 1970 (1st Supp.), c. 34, s. 13(1); Saltfish Act, R.S.C. 1970 (1st Supp.), c. 37, s. 29(2); Textile Labelling Act, R.S.C. 1970 (1st Supp.), c. 46, s. 13(1); Clean Air Act, R.S.C. 1970 (1st Supp.), c. 47, s. 36; Farm Products Marketing Agencies Act, S.C. 1970-71-72, c. 65, s. 38(2); Consumer Packaging and Labelling Act, S.C. 1970-71-72, c. 41, s. 21(1); Food and Drugs Act, R.S.C. 1970, c. F-27, s. 29(1)(b). From Studies on Strict Liability, supra note 8, at 247.

92 Elliott, Degrees of Negligence (1933), 6 So. Cal. L. Rev. 91; and Seavey, Negligence—Subjective or Objective? (1927), 41 Harv. L. Rev. 1.

93 See Studies on Strict Liability, supra note 8, at 225-28.

94 Supra note 31, at 308-09.

95 See Hart, supra note 90, at 136.

96 See supra note 90.
was content to state that the test would be "what a reasonable man would have done in the circumstances."\(^{97}\)

The other central support of this defence of due diligence is the placing of a legal burden on the defendant to prove his lack of negligence on a balance of probabilities. Although this particular innovation seems the most satisfactory of a number of options, there lingers a strong feeling that the reasoning used to arrive at such a solution could be much tighter and that some of this reasoning was the product of a dubious approach to previous judicial pronouncements. The Court realized quite rightly that the classic statement of Viscount Sankey L.C. in *Woolmington v. DPP\(^{98}\)* was a likely obstacle to the implementation of its proposals and had, in fact, been the reef on which earlier proposals for a "halfway house" had foundered:\(^{99}\)

Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject ... to the defence of insanity and subject also to any statutory exception .... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.\(^{100}\)

In an attempt to obviate this stumbling block, described as "universally accepted in this country,"\(^{101}\) the Court seemed hesitant as to whether the principle actually applied to public welfare offences or not. If it had remained at all consistent in its arguments, it would have recognized that this "golden thread" was only intended to govern that category of offences characterized by the Court as "true crimes."\(^{102}\) It is difficult to imagine that Viscount Sankey intended or even put his mind to considering whether such a rule would apply to basically regulatory offences. Also, the Court did not take advantage of the constitutionally sanctioned rule that for a provincial statute (and this is what the bulk of public welfare offences are) to be valid, it cannot purport to create an offence that is truly criminal in character.\(^{103}\) Moreover, such an error is compounded when one realizes that the Court resorted to this very same rule to justify and clarify its proposed method and scheme for classifying various offences under different heads of liability.\(^{104}\) Ignoring these valid arguments for making the "golden thread" inapplicable to public welfare offences, the Court embarked upon a series of tortuous manoeuvres to make a valid, yet basically unsound, interpretation of the decision in *Woolmington*.

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\(^{97}\) *Supra* note 7, at 181 (D.L.R.), 374 (C.C.C.).


\(^{100}\) *Woolmington v. DPP*, supra note 98, at 481-82.


\(^{102}\) See text accompanying note 63, *supra*.

\(^{103}\) Under the *British North America Act, 1867*, 30 & 31 Vict., c. 3, s. 91(27) (U.K.), the federal government has exclusive legislative authority over "[t]he Criminal Law ... including the Procedure in Criminal Matters."

\(^{104}\) See text accompanying note 135, *infra*. 
The underlying sentiment of the Court towards the “golden thread” of Woolmington is that it would be cruelly ironic if that case, “which embodies a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all.”

Although such a view is appealing, it does not excuse the transparent and feeble efforts to emasculate the classic statement of Viscount Sankey. The Court looked to the liberal interpretation of Lord Diplock in Sweet v. Parsley, where he states that Woolmington “did not decide anything so irrational as the prosecution must call evidence to prove the absence of any mistaken belief by the accused. . . . The jury is entitled to presume that the accused acted with knowledge of the facts, unless there is some evidence to the contrary originating from the accused.” From such a statement, the Court drew the unwarranted conclusion that Lord Diplock was in fact advocating a shifting of the legal burden of proof from the Crown to the defendant or, at the very least, that such an interpretation of Woolmington was compatible with such a move. Lord Diplock is suggesting no such thing. He is simply recommending that, in certain circumstances, the defendant may have an evidential burden; that is, he must raise sufficient evidence to put the issue in reasonable doubt. He did not derogate from the accepted view that if, at the end of the day, there is a reasonable doubt as to the guilt of the defendant, he must be acquitted. Moreover, if the Court had made a more thorough analysis of Lord Diplock’s opinion, it would have found that Diplock went on to say that:

Unlike the position where a statute expressly places the onus of proving lack of guilty knowledge on the accused, the accused does not have to prove the existence of mistaken belief on the balance of probabilities; he has to raise a reasonable doubt as to its non-existence.

This unnecessary and ill-conceived exercise by the Court merely invites harsh criticism and plays into the hands of the opponents of a creative and socially responsive Supreme Court of Canada.

In favouring such an interpretation of Woolmington, the Court is guilty of taking that dichotomous view in matters of onus and quantum of proof it so boldly criticized and warned against in the traditional approach to criminal liability. There is a wide spectrum of possibilities between having no responsibility to adduce evidence and having a full legal burden of proof. Indeed,

106 Supra note 52.
107 Id. at 164.
108 Id. This completes the circle of confusion. Although Dickson J. misinterprets the reasoning of Lord Diplock, Lord Diplock himself is guilty of building his own arguments on a misinterpretation of the decision in Proudman v. Dayman, supra note 49. The Australian case imposed a legal burden on the defendant and not, as Lord Diplock believed, a merely evidential burden.
109 See Cross, supra note 87, at 73-81; and Phipson, supra note 87, at 36-51. This ignorance on the part of the Supreme Court is doubly surprising when one considers that the distinctions between the different burdens were recognized as early as 1926; see Ontario Equitable Life and Accident Ins. Co. v. Baker, [1926] S.C.R. 297, [1926] 2 D.L.R. 289.
the English approach, as represented by a recent Law Commission Report\textsuperscript{110} and the opinion of an influential body of lawyers, including practitioners and academics,\textsuperscript{111} is that a purely evidential burden should be placed upon the defendant; that is, "once the prosecution have proved the \textit{actus reus}, the triers of fact may infer negligence in the defendant in the absence of any evidence to the contrary which arises whether from the prosecution's case or from any evidence given by or on behalf of the defendant."\textsuperscript{112} The main thrust of their arguments is that to do otherwise would mean that, in the event of the evidence being evenly balanced, the defendant would have to be convicted. Also, bearing in mind the much flaunted and revered principles of criminal fault, such a state of affairs would scuttle the courts' express intention to protect the morally blameless and place an unduly onerous burden upon them. Furthermore, according to such a view, the transfer of the legal burden of proof is a matter for the legislature to effect by a clear and unequivocal statement of intent. Accordingly, the Law Commission has drafted a Bill which is designed to introduce a number of fundamental statutory presumptions and put an end to any ambiguity in this particularly treacherous area of law.\textsuperscript{113}


\textsuperscript{113} \textit{Id.} The recommendations of the Report on this matter may be summarized as follows:

\begin{enumerate}
\item In respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, it should be expressly stated to what extent liability depends on intention, knowledge or recklessness, depends on an objective standard of conduct (whether expressed as liability for negligence or in some other way) or is intended to be strict.
\item Wherever, in respect of any requirement of an offence which is created by a provision in or under a statute passed on or after the appointed day, there is no provision
\begin{enumerate}
\item making liability strict, or
\item making liability depend on
\begin{enumerate}
\item the presence or absence of any particular state of mind or
\item compliance with an objective standard or conduct,
\end{enumerate}
then, to the extent that no such provision is made, the offence should involve on the part of the defendant intention or recklessness in relation to any result and knowledge or recklessness in relation to any circumstance.
\end{enumerate}
\item Wherever, in respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, liability is subject to a defence or exception which does not amount to a provision making liability depend on
\begin{enumerate}
\item the presence or absence of any particular state of mind or
\item compliance with an objective standard of conduct,
\end{enumerate}
then, the defendant should not be liable if, when the conduct required for the commission of the offence occurred, he believed that any circumstance existed
\end{enumerate}
In this instance, the Supreme Court was wise not to follow the solution adopted by its English counterparts. It chose to ignore the English preoccupation with purely legalistic arguments based on a strict positivistic outlook. Instead, it settled on a decision that responded to the actual and live problems facing the Court and made a genuine attempt to satisfy and reconcile the cogent demands of the manifold conflicting values and interests at work in this area. In striving to fulfil such a commendable objective, some of the arguments of the Court can be viewed in a much more favourable light. Consequently, the Court was motivated by the strong belief that any improvement is better than the present widespread existence of offences of absolute liability. It held that there were at least two reasons justifying such an assertion. First, it will usually be the case that the only people who know whether the defendants have acted diligently are the defendants themselves, since only they know what actually goes on at their business places. To ask the Crown to prove such facts would place too onerous a duty on them and would, further, result in the needless weakening of the enforcement of public welfare legislation. However, it has to be admitted that such a justification is rather brittle, as this objection could be raised in almost any matter on the question of mens rea. Second, by placing such a burden on the defendant, it ensures that the important social interests at play are sufficiently recognized and protected, while, at the same time, it does permit the innocent defendant the opportunity to prove his blamelessness. It must be remembered that if, at the end of the day, the evidence is evenly balanced, a conviction will be recorded.

V. METHOD OF CATEGORIZATION

It is, of course, an established and entrenched principle of Canadian common law that "it is of utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute

which, had it in fact existed, would have provided him with the defence or the exception from liability.

The Report has already been subject to strong scrutiny and critical comment. For instance, Hogan comments that "[I]t may be deduced from this Report and from its Working Papers that the Law Commission favours liability based on fault (including negligence) and is against the imposition of liability without fault, but there is nowhere in the Report a firm and clear statement of principle, nor is Parliament offered any guidance." Moreover, he goes on to say that the Report's failure to suggest a scheme by which to determine whether an offence is regulatory or is a true crime is inexcusable: "[p]erhaps I am expecting too much of the Law Commission but I envisaged it as an architect of new law, not a jobbing builder to the old." Finally, he closes with a general observation that touches on the Canadian predicament:

The problem, of course, goes much further than the substitution of liability based on fault (including negligence) for strict liability though, at the very least, a man ought not to be accounted criminal if he has taken all reasonable care to conform to the law's demands. It is pertinent to ask whether and when the imposition of criminal liability for merely negligent behaviour is proper and profitable. The suggestion that the substitution of liability based on negligence for strict liability—the so-called halfway house—will solve the problem I find altogether too facile. . . . Stupidity does not seem to me to be an adequate basis for offences which society regards very seriously. Once the man has been convicted, will it not be assumed on all sides that the offence was the result of deliberation rather than thoughtlessness?

either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court shall not find a man guilty of an offence against the criminal law unless he has a guilty mind." Accordingly, any deviation from this cardinal presumption will require the force of legislative enactment, and such an enactment will have to be expressed in the most clear and unequivocal terms. It is essential, therefore, that if the courts intend to interfere with or whittle down this principle, there must be extremely cogent and persuasive reasons for doing so. Up to the present decision, the problem had, generally, been one of deciding whether such a presumption had been rebutted or not. While on the face of it this might appear a simple task, a brief glance at the case law that has grown up on the subject reveals otherwise. Moreover, the task has taken on an even more hazardous and difficult complexion for there are now three possible categories of liability as compared to the previous two. Even if it is possible to determine successfully whether the initial presumption has been rebutted, it still remains to decide the second and equally difficult problem; namely, into which of the other two categories does it fall? Unfortunately, if the amount of time and discussion devoted to this issue is anything by which to judge, the Court has sorely underestimated or unwise to play down the difficulty and importance to be attached to providing an accurate and reliable guide with which to complete such a task. Although it has to be recognized that the Court is struggling against a state of affairs that is the product of legislative as well as judicial mismanagement, the Court must take its share of responsibility for the debilitating effect that uncertainty will have upon this crucial aspect of the law. Moreover, the ramifications of the method of categorization devised by the Court will possibly be much more far-reaching than it actually intended, especially as regards certain offences which previously required full mens rea.

The Court offered an initially attractive and crisp general formula to be used in determining into which category a particular offence should fall:

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 not in general 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 over-all 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.

The import of the "Dickson formula" is that any public welfare offence will prima facie fall within the middle category of strict liability, unless the legislature uses words that make it abundantly clear that either absolute liabil-

115 See, for example, the amount of litigation on the meaning of "possession"; see Mewett and Manning, supra note 1, at 127.
ity or full mens rea was specifically intended. In theory, such a formula is perfectly acceptable, but it completely ignores or fails to accept the realities of the situation and the difficulties that created the confusion the Court now claims to have dispelled. It is a sad fact, but the legislature is not in the habit of expressing its intention in a plain and unambiguous manner. The field of statutory interpretation is fraught with difficulties and the task of eliciting the intention of Parliament is often a futile one. Indeed, it would not be misrepresenting the situation to say that the legislature deliberately omits to consider the question of mens rea and leaves the courts with the invidious task of discovering an intention where none exists.

It can be safely assumed that the Court did not intend to tamper with those offences requiring full mens rea, but merely to temper the injustice of absolute liability offences. However, employing the “Dickson formula,” the boundary between offences requiring full mens rea and those imposing strict liability becomes fuzzy and blurred. As Lord Cransworth noted in a different context, “here is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.”

Offences the courts previously held to require full mens rea could now be interpreted as falling within this new middle category. A recent case that serves to illustrate this point is R. v. Chapin. The defendant was charged with hunting for migratory birds within a quarter mile of a place where bait had been deposited, contrary to s. 14(1) of the Migratory Birds Regulations and the Migratory Birds Convention Act. The statute was silent on the question of mens rea and, therefore, the judges were left to determine whether or not it was required. At first instance, the defendant was convicted, even though she was unaware of the presence of the bait. On appeal, Houlden J.A. dissenting, the Ontario Court of Appeal decided that mens rea was an ingredient of the offence and the defendant was acquitted. The judgments of the

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117 Williams argues that such a state of affairs is unavoidable:

Every criminal statute is expressed elliptically. It is not possible in drafting to state all the exceptions and qualifications that are intended. One does not, for instance, when creating a new offence, enact that a person under eight years cannot be convicted. Nor does one enact the defence of insanity or duress. The exemptions belong to the general part of the criminal law, which is implied into specific offences. On the Continent, where the criminal law is codified, and similarly in those parts of the Commonwealth with a criminal code, this general part is placed by itself in the code and is not repeated for each individual crime. Now the law of mens rea belongs to the general part of the criminal law, and it is not reasonable to expect [the legislature] every time it creates a new crime to enact it or even to make reference to it.


118 See Devlin, Samples of Lawmaking (London: Oxford University Press, 1962) at 71. The speeches in Warner, supra note 99 and Sweet, supra note 52, illustrate the differences in interpretation that can occur when an intention is attributed to Parliament when, ex hypothesi, Parliament has given no express indication of that intention.

119 Boyse v. Rossborough (1857), 6 H.L. Cas. 2 at 45, 10 E.R. 1192 at 1210.


121 SOR/71-376.

Court present a perfect example of how the judges felt obliged to go to one extreme or the other when, in fact, it is probable that all three judges could have agreed upon the test enunciated in Sault Ste. Marie.

Weatherston J.A., whose judgment was concurred in by Brooke J.A., recognized the deep concern and public interest in the protection of migratory birds, but felt that this did not warrant the conviction of a perfectly innocent person who, whatever precautions she had taken, could not have avoided infringing the law. On the other hand, Houlden J.A., relying on the decision in Pierce Fisheries,

From the language and the subject-matter of the statute, I think it is clear that s. 14(1) does not require mens rea. Indeed, to require mens rea would, in my opinion, nullify the effect of the subsection, since it would be difficult, if not impossible, for the Crown to prove a violation. The appellant's lack of knowledge that bait had been deposited within one-quarter mile of the place where she was hunting is, therefore, no defence to her.

All three judges considered the idea of a defence of reasonable care, but they were unsure of its standing in Canadian law. Also, they did not feel that there was a sufficient finding of fact by the trial judge to ground conclusively such a defence. Consequently, if Chapin were decided today, it is almost certain that the defendant would have been afforded the defence of due diligence. Being an obvious public welfare offence, it falls under the initial presumption and, as there is no clear indication of legislative intent, there is no evidence to dislodge or rebut such a presumption.

However, not all cases will be disposed of in such a satisfactory and ameliorating way. With the scope and concept of public welfare offences being so vague and loose, there is a distinct possibility that the prosecution might be tempted to argue, and the courts be persuaded to accept, that certain offences, which previously required full mens rea, now fall more correctly into the middle category of strict liability. An example of this state of affairs is provided by the circumstances in Lim Chin Aik.

The Court maintained that the Act was clearly a piece of legislation designed to promote the general welfare of the public and, therefore, prima facie fell into the middle category of liability. As it could not be construed as a "true crime," nor could the language of the offence be said to convey in an unequivocal fashion that the legislature intended to impose absolute liability, this initial presumption could not be rebutted and the offence was one of strict liability. Finally, the Court did not feel that it was necessary to send the case back for a new trial as, after a careful consideration of all the evidence, it thought that it would have been unreasonable to have convicted Mrs. Chapin.

\[\text{\textsuperscript{123}} \text{R. v. Pierce Fisheries Ltd., supra note 33.}\]
\[\text{\textsuperscript{124}} \text{R. v. Chapin, supra note 120, at 160.}\]
\[\text{\textsuperscript{125}} \text{See text accompanying note 65, supra. Since this article was written, but before publication, Chapin went to the Supreme Court of Canada. In a unanimous judgment, delivered by Mr. Justice Dickson on March 20, 1979, the Court took an approach very similar to that suggested in the text. It found that the offence in question was one of strict liability and, applying the decision in Sault Ste. Marie, held that "the accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all the circumstances or, in other words, that he was in no way negligent." The Court maintained that the Act was clearly a piece of legislation designed to promote the general welfare of the public and, therefore, prima facie fell into the middle category of liability. As it could not be construed as a "true crime," nor could the language of the offence be said to convey in an unequivocal fashion that the legislature intended to impose absolute liability, this initial presumption could not be rebutted and the offence was one of strict liability. Finally, the Court did not feel that it was necessary to send the case back for a new trial as, after a careful consideration of all the evidence, it thought that it would have been unreasonable to have convicted Mrs. Chapin.}\]
\[\text{\textsuperscript{126}} \text{R. v. Chapin, id.}\]
\[\text{\textsuperscript{127}} \text{Supra note 99.}\]
the defendant was charged with and convicted of remaining unlawfully in the Colony after a prohibition order against him, although he was unaware of any such order having been made. The Privy Council felt that, in spite of the absence of any express words requiring full mens rea, the presumption in favour of mens rea remained unrebutted where the defendant's organization of his conduct could not have resulted in compliance with or observance of the law: "[I]t cannot be inferred that the legislature imposed [absolute] liability merely in order to find a luckless victim." According to the "Dickson formula," however, such an offence would be one of negligence. In such circumstances, where the consequences of conviction are of a very grave nature, namely, permanent exclusion from a country where one's family lived, it would be unjust to make such an offence one of negligence. This would result in an unhealthy situation where "the negligent are lumped together with the callous and the real villains are never singled out." In effect, the end result of the innovation of the middle category may be to soften the aversion to strict liability so that it becomes a repository for many offences which otherwise have been interpreted to require proof of intention. This hazard was alluded to by F. B. Sayre nearly fifty years ago:

The modern rapid growth of a large body of offences punishable without proof of a guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing the orthodox requirement of a mens rea. The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal safeguards is strong, courts following the false analogy of the public welfare offences may now and again similarly relax the mens rea requirement, particularly in the case of unpopular crimes, as the easiest way to secure convictions.

Nevertheless, if the court concludes that the legislature did not intend to create an offence requiring full mens rea, it must then proceed to determine whether the offence in question imposes strict or absolute liability. At first blush, the test seems clear and simple: offences not requiring full mens rea impose strict liability unless the legislature makes "it clear that guilt will follow proof merely of the proscribed act." For instance, in the very recent case of Grottoli, the Ontario Court of Appeal was presented with an early opportunity to apply the test laid down in Sault Ste. Marie. The case involved the interpretation of certain offences under the 1970 Food and Drugs Act, a classic example of public welfare legislation. The defendant, a proprietor of a meat market, was charged that he "did unlawfully sell . . . an article of food . . . likely to create an erroneous impression . . . as to its composition." At first instance, the defendant was acquitted, as the provincial judge held that proof of mens rea was required, but none had been forthcoming. In the Ontario Court of Appeal, the Court was of the opinion that the offence was of a public welfare nature and prima facie fell into the new middle category

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128 Id. at 174.
129 Hogan, supra note 4, at 261.
130 Sayre, supra note 66, at 79.
132 Not yet reported, August 9, 1978.
133 Food and Drugs Act, R.S.C. 1970, c. F-27, s. 5(1).
as set out in *Sault Ste. Marie*. However, as the Act allowed the defence of
due diligence in respect of other offences under the Act involving pre-pack-
aged goods, it was held that the presumption had been impliedly rebutted
by the legislature and absolute liability was intended.

In such circumstances where the intention of the legislature is made
manifest, the "Dickson formula" provides an effective method of categoriza-
tion. However, in the great majority of public welfare statutes, the intention
of the legislature is woefully obscure. In attempting to meet such a situation,
the Court suggests a number of criteria that may be considered in resolving
this problem of whether an offence imposes strict or absolute liability: "the
over-all regulatory pattern adopted by the Legislature, the subject matter of
the legislation, the importance of the penalty, and the precision of the lan-
guage." These are largely the same factors that are to be used in deciding
whether or not an offence is of a public welfare nature. Consequently, the
courts are being asked to utilize the same test in trying to solve two entirely
different problems. By relying on such a loose and imprecise test, the judge's
outlook and sense of social justice will continue to be a decisive, if an un-
avowed, consideration in the categorization process and, as such, will remain
a very real obstacle to the accurate prediction of the degree of liability re-
quired in any particular offence.

A topical illustration of the difficulties that *Sault Ste. Marie* might cause
for the lower courts in interpreting and applying existing legislation is pro-
vided by a case that is currently under appeal in Ontario, *R. v. Z-H Paper
Products Ltd.* An employee of the defendant company was injured while
cleaning a machine that was in motion, even though he had been told re-
peatedly and expressly not to do that. The defendant was charged with failing
to ensure that the necessary precautions and procedures were followed under
section 24(1) (c) of *The Industrial Safety Act, 1971*. At first instance, the
provincial judge, while recognizing the diligence and conscientiousness of the
company, held that the offence was one of absolute liability and, therefore,
it was not open to the defendant to exculpate itself by showing that it was
free of fault. The appeal is likely to centre upon the interpretation of section
21(3) of that same Act:

> An employer shall take every precaution reasonable in the circumstances for the
> protection of an employee in the industrial establishment, but this provision shall
> not be applied to affect the strict duty imposed by subsection 1. (Emphasis
> added).

Remembering the special meaning attached to "strict" by the Court, it will
be extremely interesting to see how the courts deal with such a situation.

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134 s. 29(1). This form of statutory interpretation was expressly disapproved of by
Lord Evershed in *Lim-Chin Aik, supra* note 99, at 173 and 176; and by Lord Reid in
*Sweet, supra* note 52, at 149.


136 April 5, 1978 (Prov. Ct.).

137 S.O. 1971, c. 43.

138 *Id.*
Moreover, it raises some intriguing and wider questions of how statutes, drafted in the light of then existing principles of common law, are to be interpreted if there is a significant change in the underlying structure of this law.

Finally, in *Sault Ste. Marie* itself, the problem concerned the interpretation of the words "cause" and "permit" and, as the Court noted, "these two words are troublesome because neither denotes clearly either full mens rea or absolute liability." Having listed ample authority to support both conclusions, the Court felt justified in concluding that "the conflict... shows that in themselves the words 'cause' and 'permit' fit much better into an offence of strict liability than either full mens rea or absolute liability." The logic of such an argument is entirely delusory. Although the Court was correct in stressing the fact that pollution is a public welfare offence meriting being placed *prima facie* in the middle category and that as "valid provincial legislation it cannot possibly create an offence which is criminal in the true sense," the existence of earlier conflicting authorities is not of itself capable of leading to such a conclusion. There lurks a suspicion that the true rationale behind such a conclusion is that where divided opinion existed previously, the words creating the offence should be construed as intending the imposition of strict liability, that is, the making available of a defence of due diligence to the defendant. Moreover, if that were so, the result-oriented basis of the decision goes part of the way to explaining some of the logic followed and arguments favoured by the Court. In effect, the Court decided that the offence in question warranted a defence of due diligence and proceeded to construct and articulate a scheme that would meet this purpose. Such an expedient and result-oriented process of reasoning is not conducive to a clear and authoritative statement of legal principles intended to dispel the doubt and confusion that previously existed.

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139 Supra note 7, at 183 (D.L.R.), 375 (C.C.C.).


141 Supra note 7, at 183 (D.L.R.), 375 (C.C.C.).

142 Id. at 182 (D.L.R.), 375 (C.C.C.).
VI. CONCLUSION

This paper has tried to present a thorough and critical analysis of the decision of the Supreme Court of Canada in *Sault Ste. Marie* and to unearth some of the broader policies which underlie its conclusions on the role that *mens rea* is to play in public welfare offences. A number of possible difficulties with its decision have been brought out, but the acid test will be its practical utility and the effect it will have upon the actual administration and enforcement of the ever-widening field of public welfare offences. However, although the Court has taken a significant and welcome step forward in developing a "halfway house" of liability, it is more than likely that the Court will be troubled again by the question of absolute liability offences in the not too distant future. It is hoped that, when such a situation arises, the Court will take the time and trouble to articulate its overall policy in matters of criminal liability, to develop a keener perception of its own role in the entire legal process, and to complete the job it started so promisingly in *Sault Ste. Marie*. 