HIN LIN YEE AND ANOTHER v. HKSAR [2010] HKCFA 11; [2010] 2 HKLRD 826; (2010) 13 HKCFAR 142; [2010] 3 HKC 403; FACC 7/2009 (26 March 2010)

FACC No. 7 of 2009

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 7 OF 2009 (CRIMINAL)

(ON APPEAL FROM HCMA NO. 574 OF 2008)

Between:

HIN LIN YEE	1stAppellant
LO SIU KUEN	2nd Appellant
- and -	
HKSAR	Respondent

Court: Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Litton NPJ and Lord Hoffmann NPJ

Date of Hearing: 8 March 2010
Date of Judgment: 26 March 2010

J U D G M E N T

Mr Justice Bokhary PJ :

1. Neither the reasons of the magistrate nor those of the appeal judge can be supported. The reasoning of the majority in *HKSAR v Shun Tak Properties Ltd* [2009] 3 HKLRD 299 is wrong and that of Stock JA in that case is right. Nevertheless and despite the able arguments presented by Mr Gerard McCoy SC for both appellants, the doctor's convictions can and should be affirmed on the following basis. As a matter of construction, the only defences open to him were

the two expressly provided for by statute as noted the other members of the Court. And as they have noted, there are unassailable findings of fact which preclude the doctor from successfully relying on either of those two defences.

2. What about the assistant? Tragically, she has passed away. That was after her appeal to this Court had been lodged. If a conviction is unjust, it is not rendered otherwise by an appellant's death. On a proper understanding of access to the courts under our constitutional arrangements, this Court has a discretion to entertain an appeal even though the appellant has died since it was launched. We can entertain the appeal if justice so demands. It can be justice to the reputation of the dead, to the feelings of the living, to the finances of the estate, to the purity of the law or to all or any of those interests. The finances of the estate are not involved in the present appeal. But all those other interests are. Combined they are involved in such a way and to such a degree as to make it just that the assistant's appeal be entertained despite her death. Of those other interests, the deceased's reputation is by no means the least important. Reputations last longer than life. Actual conviction is graver than mere defamation. And the judiciary's responsibility is greater, for convictions are by the judiciary.

3. A sale can be by an agent. Indeed s.73 of the **Public Health and Municipal Services Ordinance**, Cap.132 (which section comes within the same Part of that Ordinance as the section under which the assistant was charged) provides as follows :

"For the purpose of this Part, every person shall be deemed to sell, offer, expose or advertise for sale, or have in his possession for sale, any food for human consumption or drug for use by man, who sells, offers, exposes or advertises for sale, or has in his possession for sale, such food or drug either on his own account or as the servant or agent of some other person, and, where such person is the servant or agent of some other person, such other person shall, subject to the provisions of this Part, be under the same liability as if he had himself sold, exposed or advertised for sale, or had in his possession for sale, such food or drug."

But two questions remain, one of statutory interpretation and the other of constitutional protection.

4. The question of statutory interpretation is whether what the assistant did amounted to a sale within the meaning of this legislation. As a general rule, an agent for a disclosed principal does not incur even civil liability. It is no small matter, therefore, to arrive at a construction under which a morally blameless agent incurs criminal liability. The rule against doubtful penalisation was expressed thus (at p.609) by Lord Hewart CJ when delivering the judgment of the Court of Criminal Appeal in *R v Chapman* [1931] 2 KB 606 :

"Much argument has taken place and may yet take place on the meaning of the words, 'of twenty-three years of age', but we have come to the conclusion that in this case the observations, based upon a series of case, which are to be foundin Maxwell on the Interpretation of Statutes, 7th ed., p.244 apply. They are as follows : 'Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself.' On that ground the Court has decided to allow the appeal and quash the

conviction."

5. Then there is the question of constitutional protection. In the context of freedom of the person, the decisions of this Court in *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415 and in *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 proceed on the basis that a law may be unconstitutional for arbitrariness. *So's* case in particular proceeds on the basis that the imposition of absolute liability may be unconstitutional for arbitrariness where the imposition of such liability would have no deterrent effect.

6. There are insufficient findings of primary fact to support a sure conclusion that the assistant sold within the meaning of the provision under which she was charged. Nor are there sufficient findings of primary fact on which to decide what (if any) measure would in a situation like the assistant's have a deterrent effect such as to render criminal liability conformable with freedom of the person and not arbitrary. The law should not – and in my view does not – dissipate its energies by fixing criminal liability on morally blameless people to no useful purpose. For the law to do that in a context like this would be grossly prejudicial not only to justice but also ultimately to **public health** and safety. The assistant's conviction cannot stand.

7. I would dismiss the doctor's appeal to affirm his convictions and allow the assistant's appeal to quash her conviction. It was on extremely short notice that Mr Kevin Zervos SC came into these appeals to lead for the prosecution upon Mr Robert Lee SC having to drop out of the appeals due to his father's illness. We have already asked Mr Zervos to convey our sympathies to Mr Lee. Since then we have been saddened to learn that the elder Mr Lee has passed away. And we express our condolences to his family. In thanking Mr Zervos for his assistance, it is appropriate to observe that in a crisis the efficiency of the legal process is heavily dependent on the sort of ability and energy which he has displayed.

Mr Justice Chan PJ :

8. I agree with the judgment of Mr Justice Ribeiro PJ. I would just like to add a few words arising from the joint judgment of Stuart-Moore VP and Yeung JA in *HKSAR v Shun Tak Properties Ltd* [2009] 3 HKLRD 299 which was followed by Deputy Judge Line (as he then was) in the present case.

9. I do not accept, as the joint judgment seems to have held, that as a matter of law, the common law defence of honest and reasonable belief does not apply to a statutory offence involving **public health** and safety. This proposition is not supported by the authorities and is not consistent with the statutory construction approach which is adopted in statutory offence cases.

10. In many cases of statutory offence, the legislative policy may be such that offences are created by statute where it is clearly intended that criminal liability is imposed upon proof of the prohibited act or activity and the accused is not allowed to rely on any defence or to show that he is free from fault. These are sometimes described as absolute liability offences (although some would also loosely call them strict liability offences). This happens when, upon a proper construction of the statute in question, the court holds that the presumption of *mens rea* has been displaced. In some cases, however, in order to alleviate the harshness on the accused charged

with an offence which does not require proof of *mens rea* in respect of the elements of *actus reus* and thus running the risk of being convicted without any fault on his part, the courts are inclined to allow the accused to rely on the common law defence by showing that he had an honest and reasonable belief in a state of facts which, if they exist, would make the prohibited act innocent. See, e.g. *Sherras v De Rutzen* [1895] 1 QB 918, Day J at 921*; R v Tolson* (1889) 23 QBD 168, Cave J at 181 and 183; *Maher v Musson* (1934) 52 C.L.R. 100, Dixon J at 104; *Proudman v Dayman* (1941) 67 C.L.R. 536, Dixon J at 540; *R v City of Sault Ste. Marie* 85 D.L.R. (3d) 161, Dickson J at 180-181; *Millar v Ministry of Transport* [1986] 1 NZLR 660; *Attorney General v Fong Chin Yue* [1995] 1 HKC 21, Bokhary JA at 37, 38; *HKSAR v Paul Y–ITC Construction Ltd* [1998] 2 HKLRD 35, Stuart-Moore JA at 45; and *Attorney General v Mak Chuen Hing & others* (1996) 6 HKPLR 458, Litton VP at 463, 464.

11. The existence of this "half way house" and its nature have not received universal agreement, especially in the English decisions. The reluctance in accepting this possibility as a matter of construction is based on the concern regarding shifting the burden to the accused to prove he has an honest and reasonable belief. But the preferred view is that the court should have this viable option in the process of statutory construction instead of having no alternative but to come to the conclusion that the offence in question imposes absolute liability. In appropriate cases, the shifting of burden to the accused to prove on the balance of probabilities something which is peculiar to his own knowledge and which the prosecution is unable to disprove beyond reasonable doubt is not unusual; nor is this any more unfair or inconsistent with human rights provisions than imposing absolute liability on him.

12. At the heart of any dispute over whether an offence imposes absolute liability or whether the half way house is available in a particular case is always the construction of the relevant statutory provisions: what was the intention of the legislature when creating such an offence.

13. The crucial question in the present case is whether the presumption of *mens rea* is displaced and if so, whether this common law defence is excluded expressly or by necessary implication by the language and subject matter of the statute. (*Sherras v De Rutzen* [1895] 1 QB 918, Wright J at 921*; Lim Chin Aik v R* [1963] AC 161, Lord Evershed at 173*; Sweet v Parsley* [1970] AC 132, Lord Diplock at 162*; Gammon (Hong Kong) Ltd v AG of Hong Kong* [1985] 1 AC 1, Lord Scarman at 14 and 16.)

14. The language of the statute which must be examined includes not only the wording of the offence but also any defence which may be provided in the statute itself. The subject matter of the statute that must be taken into account refers to the social context in which the offence was created and this includes: the purpose of the statute: whether the statute is concerned with an issue of social concern or **public health** and safety; the nature of the offence: whether it is truly criminal or merely regulatory and whether the penalty to be imposed for contravention is substantial or not; and whether the creation of absolute liability will be effective in promoting the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. Depending on the circumstances of each case, some of these matters no doubt carry more weight than others in deciding whether the presumption of *mens rea* is displaced and if so, whether it is open to the accused to rely on the common law defence. In this connection, I

would respectfully agree with the analysis in sections K and L in Mr Justice Ribeiro's judgment.

15. It is thus clear that these questions are ultimately to be resolved by a construction of the relevant provisions. There is no support in the authorities for a rule of law which requires the displacement of the presumption of *mens rea* simply on the ground that it is a piece of safety legislation. Where the declared object of the statute is the protection of **public health** and safety, the court would no doubt be much more ready to come to that conclusion.

16. I should also mention that where a statutory defence is expressly provided in the same statute creating the offence, it is not correct to say (as suggested by Deputy Judge Line in *HKSAR v Hyundai Engineering Construction Co Ltd*, HCMA 815 of 2002) that as a matter of law, the common law defence is necessarily excluded. Whether this is so depends on the construction of the statutory defence in the context of the whole statute. One must examine the scope of such statutory defence and the purpose it is aimed at serving in deciding whether it is intended that the common law defence is replaced or excluded. Where the applicability of the common law defence is inconsistent with the presence and the terms of the statutory defence, the necessary implication must be that the legislature intended the exclusion of the common law defence.

17. For the reasons given by Ribeiro PJ, I agree that on the true construction of the Ordinance, it is not necessary for the prosecution to prove *mens rea* in respect of the s.54(1)(a) offences and the common law defence of honest and reasonable belief is not open to the appellants, particularly in view of the statutory defences provided in ss70 and 71. This may seem at first sight to be harsh on the appellants, particularly the 2nd appellant, an assistant in the 1st appellant's clinic. But this conclusion is, in my view, justified by the policy behind the legislation. The object of s.54 is clearly for the protection of users of any drug intended for human consumption. It is of vital importance to ensure that the drug is fit for use, or else, tragic consequences may follow. The seller of the drug (the definition of which term is extended by s.73 to cover the 2nd appellant in the present case) is usually the last person in the chain before the drug is delivered to the patient. Given the importance of public safety and the patient's almost complete reliance on those who actually sell the drug to him, it is clearly the intention of the legislation that the seller must always be vigilant and should be responsible for ensuring that the drug is really fit for consumption before handing it over to the patient. In the present case, there is no dispute that the 1st appellant was a seller of the drug in question. With regard to the 2nd appellant, the evidence clearly shows that she was also involved in the sale of the drug (having prepared and labeled it, explained the dosage to the patient's mother and collected the money). That was not merely physically handing over the drug to the patient as instructed by the 1st appellant without any means of knowing what it was that was given to her by the 1st appellant. If she was in a position to do something to ensure compliance with the statutory requirements, and from the evidence, she certainly was in such a position, then to allow persons in her position to escape liability on the basis that she did not sell the drug would not afford the much needed protection to the patient as intended by the legislation and the purpose and object of the statute would be defeated or at least rendered much less effective.

Mr Justice Ribeiro PJ :

18. The 1st appellant is a medical practitioner. The 2nd appellant, who unfortunately died

recently, was his assistant at his clinic in Tung Chung. The Court will, at the request of her counsel, proceed in any event to deal with the 2nd appellant's appeal with which it is seized.

A. The proceedings and convictions

19. The 1st appellant was convicted under four summonses for selling a drug intended for use by man but unfit for that purpose, contrary to section 54(1) of the **Public Health and Municipal Services Ordinance**[1] ("PHMSO"). He was also convicted under one summons for possessing for sale a drug which had not been registered by the manufacturer with the Pharmacies and Poisons Board, contrary to regulation 36(1) of the Pharmacy and Poisons Regulations[2] ("PPR"). He was fined a total of $80,000 by the Magistrate, John T Glass Esq, which fines were reduced on appeal before Deputy Judge Line (as Line J then was) to a total of $45,000. The 2nd appellant was convicted under one summons for an offence against section 54(1). She was initially fined $3,000, but this was reduced to $1,500 on appeal.

20. The section 54(1) convictions related to the 1st appellant having, on four separate occasions, prescribed for children who were his patients, and accordingly sold to their respective parents or guardians, a medicine labelled as "Piriton" containing a drug called Chloropheniramine ("the medicine") which was unfit for human use because it was contaminated to varying degrees with isopropyl alcohol ("the contaminant"). The 2nd appellant's conviction was based on the contention that she had engaged in selling the contaminated medicine on one of those four occasions.

21. When the contamination was reported, the 1st appellant's clinic was inspected by officers of the Department of Health. He told them that the medicine dispensed to the four children had originated from a 3.6 litre bottle labelled as "Chloropheniramine Maleate 10mg/5ml" ("CM 10mg/5ml"). He explained that the drug was decanted from that large bottle into a 500 ml container from which each of the four small bottles of medicine dispensed to the children were filled. The 1st appellant had in his clinic three additional 3.6 litre bottles which were unopened and similarly labelled. It was discovered that the CM 10mg/5ml contained in the four 3.6 litre bottles was not a substance registered with the Pharmacies and Poisons Board. This led to the 1st appellant being charged and convicted under regulation 36(1) for possession of the CM 10mg/5ml in those four bottles.

22. The 1st appellant's case in relation to the regulation 36(1) possession offence has throughout been that he was unaware of the fact that the CM 10mg/5ml in the four bottles was unregistered; that he had obtained them from Christo Pharmaceuticals Ltd ("Christo") which was a reputable, long-standing and trusted supplier; and that he was accordingly entitled to rely on the statutory defence under regulation 36(1C) of the PPR on the basis that he did not know and could not with reasonable diligence have discovered that the substance in question was not registered with the Board.

23. In relation to the section 54(1) offence, the appellants' case is that they were unaware of the contamination; that the contaminant must have been introduced before the drug had been delivered; and that they are entitled to rely on a common law defence on the basis that they had honestly and reasonably believed the medicine to be fit for its purpose when sold to the patients.

No reliance was placed either at the trial or before the Judge on statutory defences under sections 70 and 71 of the PHMSO (to which I shall return).

24. The Magistrate convicted the appellants of the section 54(1) offences after making detailed findings regarding the contamination. He discounted the possibility of contamination by the patients. He also found that the four 3.6 litre bottles, including the opened bottle from which the 1st appellant claimed to have dispensed the prescribed medicine, had not been supplied by Christo and that, in any event, the contaminant was not present in any of the 3.6 litre bottles nor in the 500 ml container used for decanting the medicine into the small bottles provided to the patients. This accorded with the prosecution's case which was that the contaminant had somehow been introduced in the decanting process at the clinic and not higher up in the supply chain.

25. The Magistrate however made a fatal error. He purported impermissibly to draw highly damaging inferences on the basis of his findings, namely, that the 1st appellant (and the 2nd appellant on his instructions) had deliberately caused the contaminant to be introduced into the children's medicines and that he had destroyed similarly contaminated bottles to avoid being incriminated.

26. Those inferences were completely unjustified. They involved grave allegations which had not been raised by the prosecution and had never been put to the 1st appellant. While the prosecution's case was that the contamination must have occurred at the clinic, it had never suggested that this had happened intentionally. On appeal, the prosecution did not seek to support the Magistrate's conclusions as to deliberate contamination.

27. Accordingly, the Judge held that the Magistrate's verdict could not stand. He nevertheless held that the convictions should be sustained. He so held in relation to the section 54(1) offences because, as he put it, the Court of Appeal had decided in *HKSAR v Shun Tak Properties Ltd*,[3] "that the so-called common law defence had no application to safety legislation". He therefore decided that the section 54(1) offences were offences of absolute liability, leaving the appellants with no defence. He also confirmed the conviction under regulation 36(1) holding (as the Magistrate had done) that on the evidence, the 1st appellant could not bring himself within the reasonable diligence defence under regulation 36(1C) referred to below.

28. The Appeal Committee gave leave to appeal, certifying as a question of law of great and general importance the question "whether there are common law defences to section 54(1)(a) offences". Leave to appeal was also granted in relation to the regulation 36(1) offence on the substantial and grave injustice ground. I should stress that no constitutional issues were raised and the discussion in this judgment proceeds solely on the basis of common law principles.

B. The statutory provisions

B.1 The PHMSO provisions

29. Section 54, which creates the sale offence, materially states as follows:

(1) Subject to the provisions of this section, any person who –

(a) sells ...;

... any drug intended for use by man but unfit for that purpose, shall be guilty of an offence.

30. Section 73 is relevant to the case against the 2nd appellant in that it extends the sale offence under section 54(1) to persons acting as agents:

For the purpose of this Part,[4] every person shall be deemed to sell ... any ... drug for use by man, who sells ... such ... drug either on his own account or as the servant or agent of some other person, and, where such person is the servant or agent of some other person, such other person shall, subject to the provisions of this Part, be under the same liability as if he had himself sold ... such ... drug.

31. Defences to offences under Part V of the PHMSO in general, including section 54(1), are provided by sections 70 and 71 which relevantly state as follows:-

Section 70(1)

A person against whom proceedings are brought under this Part shall, upon information duly laid by him and on giving to the prosecution not less than 3 clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings, and, if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence.

Section 71

(1) Subject to the provisions of this section, in any proceedings for an offence under this Part, being an offence consisting of selling ... any article or substance, it shall be a defence for the defendant to prove –

(a) that he purchased it as being an article or substance which could lawfully be sold or otherwise dealt with as aforesaid, or, as the case may be, could lawfully be sold or dealt with under the name or description or for the purpose under or for which he sold or dealt with it, and with a written warranty to that effect; and

(b) that he had no reason to believe at the time of the commission of the alleged offence that it was otherwise; and

(c) that it was then in the same state as when he purchased it.

(2) A warranty shall only be a defence in proceedings under this Part if-

(a) the defendant –

(i) has, not later than 3 clear days before the date of the hearing, sent to the prosecutor a copy of the warranty with a notice stating that he intends to rely on it and specifying the name and address of the person from whom he received it; and

(ii) has also sent a like notice to that person; ...

(5) For the purposes of this section and of section 72, a name or description entered in an invoice shall be deemed to be a written warranty that the article or substance to which the entry refers can be sold or otherwise dealt with under that name or description by any person without contravening any of the provisions of this Part.

B.2 The PPR provisions

32. Regulation 36(1) creates the possession offence in the following terms:-

(1) Subject to paragraphs (1A), (1B) and (1C), no person shall … possess for the purposes of sale, distribution or other use any pharmaceutical product or substance unless the product or substance is registered with the Board –

(a) by the manufacturer, if the pharmaceutical product or substance is manufactured in Hong Kong; ...

33. Regulation 36(1C) provides a defence:-

(1C) It shall be a defence to a charge against any person for contravening paragraph (1) if the person proves that he did not know and could not with reasonable diligence have discovered that the product or substance was not registered with the Board.

C. The issues on this appeal

34. The appellants' response to the section 54(1) charges is to contend that the medicine was sold in the honest and reasonable, albeit mistaken, belief that it was fit for human use. As noted above, relying on *HKSAR v Shun Tak Properties Ltd*[5] (to which I shall return), the Judge held that such a belief did not exculpate them and that the convictions had to be sustained on the basis that section 54(1) created an absolute offence.

35. This appeal therefore raises the general question of principle whether, under Hong Kong law, performing an act prohibited by statute in the mistaken but honest and reasonable belief that the circumstances associated with that act are such that, if true, no liability would attach, constitutes a common law defence to that offence (or alternatively means that a requisite mental element of the offence has not been established).

36. If such an exculpatory or defensive doctrine operates in principle in Hong Kong, the question arises whether it applies to the offence created by section 54(1).

37. With regard to the regulation 36(1) offence, the question is simply whether the Judge was right to sustain the conviction on the basis that the 1st appellant failed to bring himself factually within the defence under regulation 36(1C).

D. The mental element in statutory offences

38. The search for an answer to the general question of principle must begin by considering the law's approach to determining the mental elements of any given statutory offence.

D.1 The presumption of mens rea

39. What, if any, mental state is required is a matter of statutory construction. The statute may of course be specific, saying for instance that the act[6] must be done "wilfully", "knowingly", "negligently", "without due care and attention" and the like. It may go further and lay down a requirement not merely of a basic intent but also a specific intent: the alleged burglar, for example, must be shown to have (intentionally) entered a building as a trespasser with the specific intent of stealing or committing one of the other named offences when inside.[7] Such provisions pose no problems beyond having to resolve possible arguments as to the scope of the words used and their proper application to the facts.

40. The possible difficulty, in cases like the present, arises because the provision which creates the offence is silent or ambiguous as to the state of mind required. Section 54(1) obviously does not criminalise simply the selling of drugs but the selling of a drug "intended for use by man but unfit for that purpose". However, it does not tell us what the defendant's state of mind must be regarding the drug's condition of unfitness.

41. In such a situation, it is generally accepted[8] that the starting-point is that the statute must be construed adopting the presumption that it is incumbent on the prosecution to prove *mens rea* in relation to each element of the offence.[9] Although the presumption applies in cases of ambiguity, as Lord Steyn points out in *R v K*:[10]

"The applicability of this presumption is not dependent on finding an ambiguity in the text. It operates to supplement the text."

42. As Brennan J points out in *He Kaw Teh v The Queen*,[11] application of the presumption of *mens rea* involves requiring the prosecution to prove the state of mind appropriate to the external (that is to say, non-mental) element of the offence in question. Thus, where the offence prohibits a particular act, the presumption of *mens rea* generally requires the statute to be read as requiring voluntariness and intention or recklessness in the performance of that act. And where criminality is dependent upon that act being done in specified circumstances, the provision is construed as requiring it to be shown that the defendant knew of or was reckless as to the existence of those circumstances. In the discussion which follows, I will focus on the defendant's state of mind in

relation to the material circumstances surrounding his performance of a prohibited act.

D.2 Displacing the presumption

43. It is equally firmly established that a statute may, on its proper construction, displace the presumption of *mens rea* expressly or by necessary implication.[12]

44. It is at this point that a note of caution in analysing the authorities should be introduced. There has been extensive discussion in various common law jurisdictions of principles which may give guidance in deciding whether the presumption of *mens rea* has been displaced in a given instance. The case-law employs the same concepts and terminology in discussing the mental requirements, postulating the need, for example, to examine the statutory language and purpose; the nature and seriousness of the offence and its attendant penalties and social stigma; the utility of imposing sanctions; the prevailing societal conditions; and so forth. I shall return to discuss such matters. However, the point I seek to emphasise is that the application of those guiding factors necessarily depends on what alternatives exist to take the place of the *mens rea* requirement, should it be supplanted. And on that question – what the available alternatives to *mens rea* are – common law judges of the greatest eminence have disagreed over time and across the jurisdictions.

45. The point bears some elaboration. The question: “Has the presumption of *mens rea* been displaced in the present case?” cannot be addressed alone or in the abstract. It must be considered in tandem with the question: “If so, by what? By what, if any, mental requirement is the supplanted requirement of *mens rea* to be replaced?” The answer to the second question inevitably influences how the first is approached.

46. Thus, if the only possible consequence of displacing the presumption is that liability must be held to be absolute, such an outcome might be considered unacceptable in a particular case, resulting in a construction which leaves the presumption intact. But in a jurisdiction which allows the alternative of a halfway house between requiring proof of full *mens rea* on the one hand, and absolute liability on the other, for instance, by recognizing a defence of honest and reasonable belief, the court may much more readily conclude that the presumption is displaced, holding that the middle position accords with the legislative intent whereas absolute liability does not.

47. It is accordingly appropriate, before undertaking the task of determining what, if any, mental requirement attaches to the element of unfitness for human use in section 54(1) of the PHMSO, to trace the common law’s development regarding the presumption of *mens rea* and to ascertain what, if any, alternatives to *mens rea* are available under Hong Kong law.

48. Three potential alternatives are conveniently illustrated by examining developments first in England and Wales, secondly in Australia, and thirdly, in Canada and New Zealand grouped together. A fourth category involves cases where the mental element is governed by special defences provided by offence-creating statutes.

E. The developments in England and Wales

E.1 The early decisions

49. Developments in this area can be traced back to the English decision in *R v Tolson*,[13] where the defendant was charged with bigamy. The statute provided that a person who "being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony". The jury found that the defendant went through a ceremony of marriage believing in good faith and on reasonable grounds that her husband was then dead. As it turned out, he was still alive. Nine of the 14 judges[14] who determined the case stated by Stephen J quashed her conviction. In his judgment as part of the majority Cave J, made the following well-known statement:

"At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, *actus non facit reum, nisi mens sit rea.*"[15]

50. It will be observed that there is a certain ambivalence in this proposition since it speaks of an honest and reasonable belief as a "good defence" while at the same time suggesting, somewhat inconsistently, that it is a constituent part of the *mens rea* requirement.

51. There was also a difference in the approaches of the two judges of the Divisional Court in the well-known case of *Sherras v de Rutzen*.[16] The appellant was a licensee of a public-house charged with supplying liquor to a constable who was in fact on duty but whom the appellant believed bona fide and on reasonable grounds to be off duty. Day J's approach was to construe the relevant statutory provision (which was silent as to the requisite mental element) as impliedly shifting the burden of proof so that "the defendant has to prove he did not know" his customer was on duty.[17] Wright J, on the other hand, (although expressing agreement with Day J) held that the presumption of *mens rea* had not been displaced. On either view, the appellant's conviction had to be quashed.

52. In *Bank of New South Wales v Piper*,[18] the Privy Council favoured the view (corresponding to one facet of Cave J's judgment in *Tolson*)that :

"... the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence facts which, if true, would make the act charged against him innocent."

53. These early cases plainly allowed for the possibility of a middle course in the construction of statutory offences. The presumption was that the prosecution had to prove *mens rea* and, while its displacement might mean that the offence had to be treated as one of absolute liability, an intermediate construction was possible whereby the statute might be held either to require a form of *mens rea* constituted by the absence of honest and reasonable belief (the *Bank of New South Wales* approach which I shall refer to as "the *mens rea* constituent approach"), or to permit the defendant to prove by way of defence that he had such a belief (the approach of Day J in *Sherras*

v de Rutzen, referred to here as "the defence approach").

54. While, as discussed below, there may be some doctrinal difficulties with both those approaches, they obviously have much to commend them in comparison with the approach adopted in *Parker v Alder*,[19] a case decided at roughly the same time and described in *Smith and Hogan[20]* as a "notorious case". The defendant was there charged with supplying adulterated milk. Having contracted to supply milk for delivery in London, he loaded his shipment of pure milk on a train at a local station but while in transit to London, some unknown person adulterated it with 9% water without the defendant's knowledge or consent. Lord Russell CJ held that he was nevertheless liable since it was an absolute offence, stating:[21]

"Assuming that the magistrate was right in holding that he had acted innocently and in good faith, it is obviously a case in which he ought not to have been prosecuted, and if convicted the fine ought merely to be a nominal one …"

Relying on a discretion not to prosecute or a discretion to impose a nominal penalty is a less than satisfactory response to the problem.

E.2 Rejection of the halfway house in the English authorities

55. A halfway house solution did not, however, find favour with the Privy Council. In *Lim Chin Aik v The Queen.*[22] Lord Evershed, giving the advice of the Board, disapproved Day J's suggestion that a construction involving "shifting the onus of proof to the defendant" could be adopted, approving Wright J's approach instead.

56. Although in later cases certain members of the House of Lords expressed themselves to be attracted by an intermediate solution which would place the burden of proving an honest and reasonable exculpatory belief on the defendant, they considered such a course excluded by *Woolmington v Director of Public Prosecutions*,[23] where Viscount Sankey LC had famously identified the duty of the prosecution to prove the prisoner's guilt[24] as the "golden thread" that runs throughout the "web of the English Criminal Law".

57. Thus, in *R v Warner*,[25] a case involving unlawful possession of drugs, Lord Pearce acknowledged the possibility that Parliament may have intended "what was described as a 'halfway house' ... by counsel on both sides" so that:

"By this method the mere physical possession of drugs would be enough to throw on a defendant the onus of establishing his innocence, and unless he did so (on a balance of probabilities) he would be convicted."[26]

While he described this as having "certain obvious advantages" he concluded:

"Unfortunately I do not find the half-way house reconcilable with the speech of Viscount Sankey, LC, in *Woolmington v Director of Public Prosecutions* ... Reluctantly, therefore, I am compelled to the decision that it is not maintainable. Ultimately the burden of proof is always on the prosecution, unless it has been shifted by any statutory provision. If, therefore, there is

initially in the crime an element of knowledge or guilty mind, the jury must at the end of the case acquit, if they are left in doubt."[27]

The other side of the coin is, of course, that if the presumption of *mens rea* is held to have been discharged, there would be no option but to treat the crime as one of absolute liability.

58. In *Sweet v Parsley*,[28] where the offence involved being concerned in the management of premises used for smoking cannabis,[29] Lord Reid noted the difficulties that can flow from having to make a stark choice between full *mens rea* and absolute liability. He continued:

"It would often be much easier to infer that Parliament must have meant that gross negligence should be the necessary mental element than to infer that Parliament intended to create an absolute offence. A variant of this would be to accept the view of Cave J in *Reg v Tolson* (1889) 23 QBD 168, 181. This appears to have been done in Australia where authority appears to support what Dixon J said in *Proudman v Dayman* (1941) 67 CLR 536, 540: 'As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.' It may be that none of these methods is wholly satisfactory but at least the public scandal of convicting on a serious charge persons who are in no way blameworthy would be avoided."[30]

59. In the same case, Lord Pearce again expressed his regret at having no intermediate option. Having suggested that an approach requiring the defendant to persuade the jury that he did not know might in some cases be the best solution, he continued:

"If it were possible in some so-called absolute offences to take this sensible half-way house, I think that the courts should do so. This has been referred to in *Warner's case* [1969] 2 AC 256. I see no difficulty in it apart from the opinion of Viscount Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] AC 462. But so long as the full width of that opinion is maintained, I see difficulty. There are many cases where the width of that opinion has caused awkward problems."[31]

60. English jurisprudence has not come to accept the canvassed intermediate position. In *B (A Minor) v Director of Public Prosecutions*,[32] which involved an offence under the Indecency with Children Act 1960, the House of Lords considered but rejected the *mens rea* constituent approach mentioned above. Lord Nicholls of Birkenhead considered it objectionable on the basis that it would dilute *mens rea* offences, transforming them into offences of negligence: a defendant who was found genuinely to have an honest belief which ought to have negated *mens rea* would nevertheless be convicted if the grounds upon which he formed that belief were found to be unreasonable. His Lordship stated:

"Considered as a matter of principle, the honest belief approach must be preferable. By definition the mental element in a crime is concerned with a subjective state of mind, such as intent or belief. To the extent that an overriding objective limit ('on reasonable grounds') is introduced, the subjective element is displaced. To that extent a person who lacks the necessary intent or belief may nevertheless commit the offence. When that occurs the defendant's 'fault' lies exclusively in falling short of an objective standard. His crime lies in his negligence. A statute

may so provide expressly or by necessary implication. But this can have no place in a common law principle, of general application, which is concerned with the need for a mental element as an essential ingredient of a criminal offence."[33]

61. The English authorities illustrate one model of liability which involves construing offence-creating provisions either (i) as requiring the prosecution to prove *mens rea* – the presumption of *mens rea* not having been displaced – or, (ii) where that presumption is supplanted, as an offence of absolute liability, with nothing in between. Where the offence is absolute, proof by the prosecution of the external *actus reus* elements of the offence suffices to establish liability, regardless of the defendant's state of mind.

F. The Australian cases

62. At an early stage, the Australian courts took the view, founded on *Tolson*,[34] *Sherras v de Rutzen*[35] and *Bank of New South Wales v Piper*,[36] that where the presumption of *mens rea* is displaced, a halfway house option involving honest and reasonable belief exists. The debate has focussed on the precise nature of that middle course.

63. Initially, the favoured position involved construing the statute as permitting the defendant a defence if he could prove, on a balance of probabilities, that he honestly and reasonably believed the circumstances to be such that, if true, his act would not constitute the offence. In other words, they favoured the defence approach.

64. Thus, in *Maher v Musson*,[37] a case dealing with the offence of having custody of illicit spirits where the defendant claimed to be unaware of their illicit nature, Dixon J stated:

"...authority appears to me to support the view that the absolute language of the Statute should be treated as doing no more than throwing upon the defendant the burden of exculpating himself by showing that he reasonably thought the spirits were not illicit."[38]

65. Evatt and McTiernan JJ reached the same conclusion, making it clear that while proof of *mens rea* was not required, the imposition of absolute liability was wholly unacceptable for such an offence:

"In our opinion, it would be a palpable and evident absurdity to suppose that the Legislature intended to expose an innocent messenger or carrier of spirits which are in fact illicit, but of whose character as such it is impossible that he should be aware, to the drastic penalty prescribed by s 74. Neither the language of the Statute nor its subject-matter require such a conclusion. In our opinion, a person charged with an offence under s 74 (4) is entitled to be discharged if he proves that he neither believed nor had reason to believe that the spirits in respect of which he is charged were illicit -- see *Sherras v De Rutzen*, (1895) 1 QB at p 921, per Day J."[39]

66. *Thomas v The King[40]* was, like *Tolson*, a bigamy case. Dixon J held that *Tolson* should be followed so that a wife who showed that she had married a second time in the honest and reasonable belief that her prior marriage had been dissolved by death had a good defence. He

added:

"It is difficult to see how, consistently with any humane or liberal system of law or with the acknowledged principles of the common law, any other conclusion could be reached."[41]

In so stating, His Honour was not ruling out absolute liability where appropriate. He noted that:

"... in the application of the principle of interpretation to modern statutes, particularly those dealing with police and social and industrial regulation, a marked tendency has been exhibited to hold that the prima facie rule has been wholly or partly rebutted by indications appearing from the subject matter or character of the legislation. ... But the general rule has not been and could not be impaired in its application to the general criminal law, to which the crime of bigamy belongs."[42]

67. However, the Australian High Court's approach was about to change. In *Proudman v Dayman*,[43] which involved the offence of permitting an unlicensed person to drive a motor vehicle where the defendant claimed not to know of that person's lack of a licence, Dixon J initiated a debate as to the nature of the halfway house:

"The burden of establishing honest and reasonable mistake is in the first place upon the defendant, and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment, and that on those grounds he did so believe. *The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt.*"[44]

68. The words I have italicised indicated the possibility of the intermediate alternative shifting from the defence approach to the *mens rea* constituent approach pursuant to which the burden would fall on the prosecution to negate a potentially exculpatory belief.

69. That shift was accomplished in *He Kaw Teh v The Queen*.[45] Unlike the earlier cases which were concerned with relatively minor offences, that case involved a man who was discovered at Melbourne Airport with a suitcase containing 2.788 kg of heroin in a false bottom. He was charged with an offence carrying a maximum sentence of life imprisonment. The issue was whether the judge had correctly directed the jury adopting the defence approach.

70. The majority in the High Court[46] affirmed the continued existence of the presumption of *mens* rea and also the continued existence of a halfway house in cases where the presumption is displaced.[47] But they held that where such displacement occurs, the defence approach no longer applies. Instead, the defendant has only to raise the issue of the possible existence of his exculpatory belief. It would then fall to the prosecution to show beyond reasonable doubt that he did not honestly hold that belief or, if he did, that it was not held on reasonable grounds. In other words, the *mens rea* constituent approach was adopted.

71. This shift was due to the majority's desire to accommodate *Woolmington v DPP*. They also drew support from Lord Diplock's speech in *Sweet v Parsley*,[48] where his Lordship had stated:

"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."

72. Thus, Gibbs J (with whom Mason J agreed) held that:

"if ... [the relevant section] does not require the prosecution to prove guilty knowledge, but has the effect that an accused is entitled to be acquitted if he acted with the honest and reasonable belief that his baggage contained no narcotic goods, in my opinion the onus of proving the absence of any such belief lies on the prosecution."[49]

His Honour acknowledged that the Court had taken a contrary view in *Maher v Musson[50]* but noted that "that case was decided before *Woolmington v DPP*".[51]

73. Brennan J similarly concluded:

"In principle, the absence of such a belief must also be treated as a form of *mens rea* at common law and an element of the offence which the Crown must prove. The golden thread of which Viscount Sankey LC spoke in *Woolmington* has been woven through the material of all criminal offences."[52]

74. Dawson J explained:

"There is ... no justification since *Woolmington v DPP* for regarding the defence of honest and reasonable mistake as placing any special onus upon an accused who relies upon it. ... The governing principle must be that which applies generally in the criminal law. There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. ... It is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted."[53]

75. It is worth emphasising that in adopting what I have called the *mens rea* constituent approach, the Australian High Court was not merely treating the relevant offence as one requiring *mens rea*. It was not merely saying that where the accused raises an issue as to the existence of the required knowledge or intent, the burden lies on the prosecution to prove the requisite *mens rea* beyond reasonable doubt at the end of the day. The Court was assuming that the presumption of *mens rea* has been displaced, and went on to hold that the accused had to point to evidence that he had acted honestly *and reasonably* in such innocent belief. On this approach, even if it is accepted that the accused honestly believed, for instance, that there were no drugs in his suitcase, he could still be convicted if the grounds for his belief are found not to be reasonable. Although in *He Kaw The* Brennan J argues to the contrary,[54] it is my respectful view that it is difficult to escape the conclusion that the *mens rea* constituent approach involves re-defining the offence (once the presumption of *mens* rea is supplanted) so as to import an objective standard of reasonableness as a basis of liability. It was this aspect of the *mens rea* constituent approach that Lord Nicholls objected to in *B (A Minor) v Director of Public*

Prosecutions.[55]

G. The Canadian and New Zealand approach

76. The Canadian and New Zealand courts have not shared the English and Australian inhibition against adopting the defence approach in relation to regulatory offences (where the presumption of *mens rea* has been displaced). They have ultimately not been persuaded that the defence approach in such cases falls foul of *Woolmington v DPP* by impermissibly placing a burden of proof on a defendant as a condition of his escaping conviction.

77. Thus, in *R v City of Sault Ste Marie*,[56] Dickson J in his influential judgment for the Canadian Supreme Court stated:

"It is somewhat ironic that *Woolmington's 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. There is nothing in *Woolmington's case*, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities."[57]

78. And in *Millar v Ministry of Transport*,[58] in the New Zealand Court of Appeal, Cooke P and Richardson J jointly commented:

"It is ironic that in the home of *Woolmington* a greater readiness seems to persist than is found elsewhere to construe ambiguous statutes so as to produce results the very antithesis of that case."

79. *R v City of Sault Ste Marie*,[59] was a case involving the environmental offence of discharging materials into a river that might impair the quality of the water. Dickson J acknowledged the conflicting values which must be recognized when approaching such an offence:

"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."[60]

80. After analysing the policy arguments in favour of and against absolute liability (and finding the "against" arguments generally to have greater force)[61] his Honour affirmed the need for a halfway house:

"The unfortunate tendency in many past cases has been to see the choice as between two stark alternatives; (i) full *mens rea*; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full *mens rea* is not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this

dichotomy... There has, however, been an attempt in Australia, in many Canadian courts, and indeed in England, to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent."[62]

81. Having considered and discounted the *Woolmington* objections, Dickson J concluded that a middle course incorporating the defence approach (which he referred to as one of "strict liability") should be plotted:

"I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

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 event. 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."[63]

82. The position adopted by the New Zealand courts regarding the nature of the halfway house to be adopted has fluctuated. In 1905, the defence approach was adopted in *R v Ewart*[64] on the basis of *Tolson* and *Sherras v de Rutzen* when a news vendor was prosecuted for selling a newspaper which, unbeknownst to him, contained indecent or offensive material.[65]

83. However, in *R v Strawbridge*,[66] a case involving the cultivation of cannabis plants which the accused claimed not to know were cannabis, North P held that *Woolmington* made it necessary to reject the defence approach in favour of the *mens rea* constituent approach:

"In order to present a prima facie case, it is not necessary for the Crown to establish knowledge on the part of the accused. In the absence of evidence to the contrary knowledge on her part will be presumed, but if there is some evidence that the accused honestly believed on reasonable grounds that her act was innocent, then she is entitled to be acquitted unless the jury is satisfied beyond reasonable doubt that this was not so."[67]

84. *R v Strawbridge* was followed in *Police v Creedon*,[68] although Cooke J there indicated that, but for that earlier decision, his preference would have been for the defence approach.[69] Then in *MOT v Burnetts Motors*,[70] the Court of Appeal expressly reserved the question for

future consideration in the light of Dickson J's judgment in *R v City of Sault Ste Marie*.

85. The opportunity for reconsideration arose in *Civil Aviation Dept v MacKenzie*,[71] where Richardson J (writing for the Court) stated:

".... in our judgment the Court should now follow the path taken by the Canadian decision and recognise, first, that in the case of public welfare regulatory offences such as we are concerned with in this case ... a defence of total absence of fault is available unless clearly excluded in terms of the legislation; and, second, that the onus of proving such a defence to the balance of probabilities standard rests on the defendant."[72]

86. Two reasons were given for shifting to the defence approach:

"First, it is artificial to speak in terms of *mens rea*. Liability under legislation of this kind rarely turns on the presence or absence of any particular state of mind. But in social policy terms compliance with an objective standard of conduct is highly relevant. Courts must be able to accord sufficient weight to the promotion of **public health** and safety without at the same time snaring the diligent and socially responsible. The principle of English criminal law that the burden of proof of a requisite mental state rests on the prosecution is not whittled down where in matters of public welfare regulation in an increasingly complex society the defence of due diligence is allowed because it is recognised that the price of absolute liability is too high. Second, as was emphasised in *Sault Ste Marie*, the defendant will ordinarily know far better than the prosecution how the breach occurred and what he had done to avoid it. In so far as the emphasis in public welfare regulations is on the protection of the interests of society as a whole, it is not unreasonable to require a defendant to bear the burden of proving that the breach occurred without fault on his part. As was emphasised in *Creedon*, a high standard of care is properly expected of a defendant in such a case and he must prove that he did what a reasonable man would have done."[73]

87. The change was affirmed by a Court of five in *Millar v Ministry of Transport*.[74] In their joint judgment, Cooke P and Richardson J described the *mens rea* constituent approach adopted in *Strawbridge* as "a troublesome anomaly, probably best done away with or severely confined". They continued:

"In practical effect it amounts to reading into a statute a mixed subjective and objective mens rea formula for which there is little if any warrant. If the legislature really wishes to produce this result, it can do so expressly, as in the current New Zealand rape legislation."[75]

88. Their Honours summarised the position reached in the development of New Zealand law as follows:

"*Civil Aviation Department v MacKenzie* was not meant to disrupt firmly-settled patterns of statutory interpretation in particular fields. Nor would it be right to exclude in advance the possibility that particular statutes creating offences, when silent as to fault or mens rea, may import absolute liability or some variant of liability outside the main stream. But as a general approach to statutory offences when the words give no clear indication of legislative intent and

there is no overriding judicial history, it will be right to begin by asking whether there is really anything weighty enough to displace the ordinary rule that a guilty mind is an essential ingredient of criminal liability. If there is, the next inquiry should be whether the statutory purpose and the interests of justice are on balance best served by allowing a defence of total absence of fault, with the onus on the defendant."[76]

H. Where special statutory defences are provided

89. As noted above,[77] the mental state, if any, which must be established is a matter of statutory construction. It follows that on its true construction, a statute may expressly or by necessary implication provide for special defences which represent its own halfway house, to the exclusion of any other possible middle course.

90. Whether this was the case arose for decision in *Tolson*. There, the statutory definition of the offence of bigamy contained a proviso which exempted from the provision's operation:

"any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."

91. Cave J recognized that the existence of such a special defence might exclude as inconsistent a general defence based on honest and reasonable belief, but held that on its proper construction it did not have that effect:

"But it is said that the proviso is inconsistent with the exception contended for; and, undoubtedly, if the proviso covers less ground or only the same ground as the exception, it follows that the legislature has expressed an intention that the exception shall not operate until after seven years from the disappearance of the first husband. But if, on the other hand, the proviso covers more ground than the general exception, surely it is no argument to say that the legislature must have intended that the more limited defence shall not operate within the seven years, because it has provided that a less limited defence shall only come into operation at the expiration of those years."[78]

92. In *R v Warner*,[79] Lord Wilberforce held that exclusion of any common law defence was the cumulative effect of the various statutory defences in the relevant statute:

"...there is no need, and no room, for an enquiry whether any separate requirement of *mens rea* is to be imported into the statutory offence. We have a statute, absolute in its terms, exempting a large number of 'innocent' cases, prohibiting and penalising cases which remain for a possession which involves to the extent I have endeavoured to describe knowledge or means of knowledge, or guilty knowledge. No separate problem of the mental element in criminal offences in my opinion arises; the statute contains its own solution as to the kind of control penalised by the Act."

93. In *R v K*,[80] Lord Steyn pointed out that a statutory defence in the Sexual Offences Act 1956, generally known as the "young man's defence", confined available defences to such

"young men" so that the offences were otherwise offences of absolute liability so far as the victims' ages were concerned:

"... the terms of sections 5 and 6 of the 1956 Act namely offences of having sexual intercourse with girls under 13 (section 5) and with girls under 16 (section 6) are inconsistent with the application of the presumption. The 'young man's defence' under section 6(3) makes clear that it is not available to anybody else. The linked provision in section 5, dealing with intercourse with younger girls, must therefore also impose absolute liability."

94. In *HKSAR v Ho Hon Chung Danel*,[81] Woo VP (giving judgment for the Court) stated:

"...if a statute specifies a certain defence for the statutory offence, it would be most unlikely that the legislative intent is also to make available to the accused such common law defence."[82]

95. His Lordship no doubt had in mind situations where the statutory defences were inconsistent with the concurrent availability of a common law defence since he pointed[83] out that there was an "overlap" between the statutory defences and the "common law defence of honest and reasonable belief" in that case.

I. The possible alternatives summarised

96. It appears from the foregoing survey that when one examines what, if any, mental requirement attaches to one or more of the external elements of a statutory offence, five possibilities arise, namely:

(a) that the prosecution must prove *mens rea* beyond reasonable doubt, that is, prove knowledge, intention or recklessness, the presumption not having been displaced ("the first alternative");

(b) that the prosecution need not set out to prove *mens rea*,but if there is evidence capable of raising a reasonable doubt that the accused may have performed the prohibited act in the honest and reasonable belief that the circumstances were such that, if true, liability would not attach, that the accused must be acquitted unless the prosecution proves beyond reasonable doubt the absence of such exculpatory belief or that there were no reasonable grounds for such belief ("the second alternative" which I have referred to above as the "mens rea constituent approach");

(c) that the presumption has been displaced so that the prosecution need not prove *mens rea* but that the accused has a good defence if he can prove on the balance of probabilities that the prohibited act was done in the honest and reasonable belief that the circumstances were such that, if true, he would not be guilty of the offence ("the third alternative" which I have called the "defence approach");

(d) that the defences open to the accused in relation to honest and reasonable belief are confined to the statutory defences expressly provided for in respect of the offence charged, the existence of such defences being, as a matter of construction, inconsistent with the second and third alternatives ("the fourth alternative"); and

(e) that the presumption is displaced and the offence is one of absolute liability so that the prosecution succeeds if the accused is proved to have performed the *actus reus*, regardless of his state of mind ("fifth alternative").

97. The English position emerging from the cases examined above is that only the first, fourth and fifth alternatives are recognized. In Australia, the cases reviewed suggest that the first, second, fourth and fifth alternatives exist. In the Canadian and New Zealand cases examined, the available alternatives are the first, third, fourth and fifth.

J. The position under Hong Kong law

J.1 The first, fourth and fifth alternatives

98. Statutory offences are construed in Hong Kong applying the presumption of *mens rea*, as laid down by the Privy Council in *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong*.[84] It follows that the first alternative must in principle be recognized as governing where the presumption is not displaced.

99. The relevant offences being statutory, it must also be accepted that the fourth alternative is in principle available in Hong Kong.

100. It is clear as a matter of authority that the fifth alternative, that of absolute liability, is recognized in our law. In the *Gammon* case, Lord Scarman, delivering the advice of the Privy Council, acknowledged that where the statute is of a type where the presumption of *mens rea* may be displaced, the presumption stands:

"... unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."[85]

101. *Gammon* was decided on the footing that the Hong Kong position mirrored that prevailing in England and Wales, namely, that (leaving aside special statutory defences) the choice was between requiring *mens rea* and imposing absolute liability. Lord Scarman's reference to "strict liability" must therefore be understood as a reference to "absolute liability" in the sense used in this judgment.

102. After 1997, it fell to this Court in *So Wai Lun v HKSAR*,[86] to consider absolute liability in relation to section 124 of the Crimes Ordinance[87] which makes a man who has unlawful sexual intercourse with a girl under the age of 16 guilty of an offence punishable by imprisonment for up to five years. The magistrate had acquitted the defendant applying the defence approach, finding that he did not know and had no reason to suspect that the girl was under 16 (when she was in fact only 13). The Court of Appeal, to which the case stated was referred, held that the absence of an honest and reasonable belief was no defence and ordered the case remitted for retrial.

103. This Court upheld the Court of Appeal's conclusion that section 124 was an absolute

offence in relation to the girl's age[88] and rejected constitutional challenges to that provision.

104. The controversial question in the present case concerns the existence and nature of any (non-statutory) halfway house in Hong Kong. Before looking at the decided cases, I will first examine in principle the questions: Should there be a halfway house? If so, should it take the form of the second or third alternative?

J.2 Should there be a halfway house?

105. The desirability of a halfway house is self-evident. If, as a matter of purposive statutory construction, the presumed requirement of *mens rea* is displaced, it is unsatisfactory to be left with no option but to deal with the offence as one of absolute liability, especially if it is a serious offence carrying substantial penalties. To convict a person regardless of the mental state accompanying his conduct, even if he can show that he acted in a reasonable, diligent and socially unblameworthy manner is contrary to the fundamental values of the common law. As we have seen, Lord Reid (when dissenting) decried a regime which tolerates "the public scandal of convicting on a serious charge persons who are in no way blameworthy".[89] In Australia, Dixon J[90] spoke of the "palpable and evident absurdity" of supposing a legislative intent to expose an innocent person to drastic penalties for possession of "spirits which are in fact illicit, but of whose character as such it is impossible that he should be aware". Gibbs J similarly spoke of "an absurdly Draconian result" if "a person who unwittingly brought into Australia narcotics which had been planted in his baggage might be liable to life imprisonment, notwithstanding that he was completely innocent of any connection with the narcotics and that he was unaware that he was carrying anything illicit".[91] In Canada, Dickson J[92] referred to "the generally held revulsion against punishment of the morally innocent". And in New Zealand the Court of Appeal stressed that courts must be able to enforce the promotion of **public health** and safety "without at the same time snaring the diligent and socially responsible".[93]

106. As noted above, although the English case-law, at present at least, does not recognize a middle course even for regulatory offences, eminent English judges would have preferred the law to develop otherwise. The stumbling block was thought to be *Woolmington v DPP*. To that I turn in discussing the next question.

J.3 What should the nature of the halfway house be?

107. Leaving aside halfway houses specified by statute, the practical choice is between the second and third alternatives. As discussed above, the Australian choice of the second alternative, ie, the *mens rea* constituent approach, was based on a desire to accommodate *Woolmington's* insistence on the burden of proof resting throughout on the prosecution.

108. I am respectfully in agreement with the views expressed by Dickson J in *R v City of Sault Ste Marie*,[94] and in the joint judgment of Cooke P and Richardson J in *Millar v Ministry of Transport*,[95] cited in Section G of this judgment, dissenting from the English and Australian concerns generated by *Woolmington*.

109. The presumption of *mens* rea is accepted across the jurisdictions and, unless displaced, it is

accepted that the prosecution must prove *mens rea* beyond reasonable doubt, in full compliance with the *Woolmington* requirements. But the halfway house issue only arises where the presumption *is* displaced. And in that eventuality, if one proceeds on the footing that there is no halfway house, the offence has to be regarded as one of absolute liability. If that is the case, no mental element of any kind has to be shown and *Woolmington* has no role to play in that regard. Accordingly, as Richardson J pointed out[96] to accept the availability of the third alternative – the defence approach – instead of absolute liability is not to whittle down the principles enshrined in *Woolmington*: it is to confer a defence on an accused who would otherwise be defenceless even if he had acted under an honest and reasonable belief which, if true, would have made his act innocent. I therefore see no stumbling block in the way of accepting the third alternative in principle.

110. Indeed, there is much to commend it. First, as a matter of statutory construction, since the court recoils from criminalising diligent and socially unblameworthy conduct, as Lord Reid pointed out:

"It would often be much easier to infer that Parliament must have meant that gross negligence should be the necessary mental element than to infer that Parliament intended to create an absolute offence." [97]

111. It is furthermore reasonable, in my view, to require the defendant to prove on a balance of probabilities that he did in fact act under an exculpatory honest and reasonable belief in the classes of cases we are concerned with. He will almost certainly be in the best position to establish what he believed and on what grounds. Placing the burden on him will usually represent the most appropriate balance to be struck between the values, such as the protection of **public health** and safety, underlying the regulatory offence on the one hand, and avoiding a snaring of the blameless, on the other.

112. Once one accepts the viability and desirability of the third alternative, there is little to be said for adopting the second. It lacks the advantages just mentioned and is more difficult to justify as a product of statutory construction. It requires one to read into a provision which is silent as to the mental element and which is presumed in the first instance to require proof of *mens rea*, a requirement that the prosecution prove either the absence of an honest belief or the absence of reasonable grounds for such belief. As Cooke P and Richardson J commented:[98]

"In practical effect it amounts to reading into a statute a mixed subjective and objective mens rea formula for which there is little if any warrant. If the legislature really wishes to produce this result, it can do so expressly..."

And, as we have seen, Lord Nicholls found it unacceptable.[99]

113. It follows that in the absence of established authority, I would in principle favour recognition of the third (and not the second) alternative as a middle position between *mens rea* and absolute liability in Hong Kong.

J.4 The Hong Kong case-law

114. Before 1997, the leading authority in Hong Kong was the Privy Council's decision in *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong*.[100] It did not enter into any discussion as to whether any middle course existed in Hong Kong, but as noted above, it was evidently decided on the footing that the position here mirrored the English position, namely, that (leaving aside special statutory defences) the choice lay starkly between requiring *mens rea* and imposing absolute liability. Lord Scarman[101] saw the court's task as deciding "whether it is necessary to interpret the silence or resolve the ambiguity in favour of *mens rea* or of strict liability." By "strict liability" his Lordship plainly meant "absolute liability". He mentioned no other choices.

115. An important development occurred with the decision of the Court of Appeal in *Attorney General v Fong Chin Yue*,[102] a 1994 decision involving dealing with, possession of and buying dutiable cigarettes on which duty had not been paid.[103] Bokhary JA (as Bokhary PJ then was), giving the judgment of the Court, identified four theoretical alternative regimes in relation to the mental requirements of those provisions. They correspond with the first, second, third and fifth alternatives discussed above.[104] The first alternative (*mens rea*) was rejected in relation to the offences charged as the presumption was held to have been displaced: it was an important revenue statute and to do otherwise would "leave a gap through which the guilty could escape in droves".[105] The Court went on to consider a halfway house construction of the offences instead of treating them as offences of absolute liability. In so doing, the *Gammon* decision was not thought to be an obstacle:

"We think that it would be reading too much into Lord Scarman's fifth proposition to think that it stands in the way of construing a penal provision to admit of such a defence."[106]

116. That is a view which I respectfully do not share. In any event, the Court proceeded to consider some of the Australian, Canadian and New Zealand decisions discussed above and found encouragement for a middle course in Lord Reid's dissent in *Sweet v Parsley*. It noted Lord Pearce's disappointment at not being able to take "this sensible halfway house", but commented: "... if what Lord Pearce said is not definitely a green light, it certainly is not a red one either".[107] Influenced by the enactment of the Hong Kong Bill of Rights Ordinance[108] which post-dated the *Gammon* decision, the Court decided that as a matter of "fundamental principle", a halfway house existed and a construction favouring the third alternative (the defence approach) ought to be adopted:

"To interpret the relevant provisions as requiring proof by the prosecution of knowledge would leave a gap through which the guilty could escape in droves. At the same time, to interpret those provisions as precluding a defence of reasonable belief would leave a gap through which the innocent may fall to their harm. By no proper canon of construction can the intention to create either of those gaps be attributed to the legislature."[109]

117. *Fong Chin Yue* was, in my respectful view, something of a bold decision. However, its boldness bore fruit. It was followed in 1995 by the Court of Appeal in *Attorney General v Mak Chuen Hing*,[110] and, when the matter first came before this Court (whose members

coincidentally included all three of the judges who had sat in *Mak Chuen Hing*)[111] in *Uniglobe Telecom (Far East) Ltd v HKSAR*,[112] the *Fong Chin Yue* decision effectively received this Court's imprimatur. *Uniglobe* was a case involving offences in breach of the licensing requirements of the Telecommunications Ordinance.[113] While *Fong Chin Yue* was not mentioned by name, Litton PJ obviously had it in mind when affirming the availability of the third alternative, describing the offence where such a defence was available as one of "strict liability":

"I share the view taken by the judges in the lower courts that the offence created by s 8(1)(a) is one of strict liability in that: (i) the prosecution does not have to prove guilty knowledge; but that (ii) it is a defence for the accused to prove, on a balance of probabilities, that he honestly held, upon reasonable grounds, a belief in the existence of facts which, if true, would make his conduct innocent."[114]

J.5 The recent decisions

118. As indicated above, Deputy Judge Line (as he then was) expressed the view in the present case "that the so-called common law defence had no application to safety legislation", relying on the Court of Appeal's decision last year in *HKSAR v Shun Tak Properties Ltd*.[115] Some uncertainty has thus been introduced. The question is whether the halfway house, in particular the third alternative, is in principle excluded from a whole class of cases which may be described as involving "safety legislation".

119. The decision of the majority in *Shun Tak* in fact drew upon the earlier decision of Deputy Judge Line himself in *HKSAR v Hyundai Engineering Construction Co Ltd*.[116] That was a case where the defendant was prosecuted under regulation 38B(1) of the Construction Sites (Safety) Regulations[117] for failing to take adequate steps to prevent a person on the site from falling from a height of 2 metres or more.

120. I should say at once that I have no doubt that the Judge reached the correct result in affirming the conviction in that case. The facts clearly disclosed a failure to take the necessary steps and certain special statutory defences were not made out. The appellants' purported reliance on a defence of honest and reasonable belief was misconceived. The Judge described the argument they had advanced as follows:

"It was argued that a defence was available to the appellants if they established on the balance of probability that they honestly believed for good and sufficient reason that they had complied with the regulation, albeit that they were mistaken in their belief. It was described as the common law defence."[118]

That was no more than a plea of ignorance of the law. The appellants were not saying that any of the material facts were unknown to them or believed to be such that, if true, no liability would attach. They were merely saying that they believed they had met the applicable legal standard. It had nothing to do with the halfway house defence.

121. But Deputy Judge Line did not content himself with just deciding the case. He asserted that

"safety regulations of the type in question in this case" had historically been dealt with on the basis of strict liability (by which he obviously meant absolute liability in the sense presently employed) where "mistake of fact, whether based on reasonable grounds or not" is not a defence. He opined that *Fong Chin Yue* "is not authority for a sweeping introduction of such a defence across the whole range of strict liability offences, especially those regulatory ones that have their own statutory defences." [119] He went on to state:

"In my judgment, the same considerations and reasons that justify offences of strict liability for safety regulations make it right to construe them as excluding the claimed common law defence."[120]

122. It is perfectly true – at least in the United Kingdom – that many offences under the Factories legislation have traditionally been treated as offences of absolute liability. And of course, where an offence is held to be absolute, it follows that honest and reasonable belief is no defence. But the question addressed in *Fong Chin Yue* and in this judgment is whether absolute liability is always the necessary or desirable consequence of displacing the presumption of *mens rea*. As the common law jurisprudence reviewed above shows, compelling reasons exist for recognizing a defence of honest and reasonable belief as an alternative to absolute liability in appropriate cases. Deputy Judge Line's judgment does not broach that question. He simply asserts that all such offences should be treated as absolute offences.

123. The sentiment underlying his blanket rejection of any intermediate defence for regulatory offences is stated as follows:

"I can thus see no need to upset the established law that has seen magistrates try such safety cases on the basis of strict liability without the claimed common law defence for decades. I can see good reason to exclude the defence as its availability opens up a host of issues and complexities that should have no place in summary trials of regulatory offences."[121]

124. With respect, a desire to avoid complexity in summary trials is not an acceptable basis for treating all regulatory offences as offences of absolute liability. It does not justify convicting defendants who have demonstrably acted reasonably, diligently and without actual fault. In any case, the suggestion that complexity is eliminated if the offence is construed as absolute is unconvincing. Safety legislation typically lays down numerous special defences tailored to particular offences, including due diligence defences. Magistrates trying such defences regularly deal with issues of at least comparable complexity.

125. *HKSAR v Shun Tak Properties Ltd*,[122] was a case involving a company which owned a building equipped with a gondola which could be lowered to serve as a platform for workers engaged in cleaning the building's exterior. The company was convicted regulation 4(e) of the Factories and Industrial Undertakings (Suspended Working Platforms) Regulations[123] which makes it an offence for the owner of a suspended working platform to fail to "ensure" that it is properly maintained. The company had arranged for the gondola to be maintained by a contractor but it was obvious that a serious maintenance failure had occurred, resulting in the physical failure of a machine part which caused the gondola to dip down, injuring the workers

using it.

126. I would again emphasise, with respect, that I consider the result arrived at to be correct. The Court unanimously held that the offence was one of absolute liability, given that it required the defendant to "ensure" proper maintenance, meaning that it could not escape liability by delegating maintenance to a contractor. That was a cogent construction especially, I might add, because special statutory defences existed for offences which imposed duties or requirements of various kinds,[124] but with duties to "ensure" tellingly omitted from the list.

127. However, Stuart-Moore VP and Yeung JA, who constituted the majority, did not simply decide the case on the construction argument. They based their decision in part on an affirmation of Deputy Judge Line's broad rejection of any intermediate defence in respect of safety offences. They held that the statements in *Fong Chin Yue* recognizing a middle course weremerely *obiter*.[125] Neither *Attorney General v Mak Chuen Hing*,[126] nor *Uniglobe Telecom (Far East) Ltd v HKSAR*,[127] discussed above, were mentioned.

128. The majority stated that the statute's object of protecting safety in factories and industrial undertakings "can *only* be promoted by making the offence in question one of strict liability".[128] I do not accept that such a generalisation is warranted. Clearly, in the context of industrial safety, there may be sound reasons for concluding that some offences are absolute, but the compelling rationale of a halfway house is that the statutory objectives may well be attainable by adopting an intermediate basis of liability in many, if not most, cases.

129. The majority similarly asserted:

"When it comes to **public health** /safety and in order that fewer guilty men might escape, it may be necessary, in the public interest, to convict morally blameless persons if 'blameless' persons refers to people who lack *mens rea*."[129]

130. And again:

"To ensure compliance with the Ordinance and the Regulation, it is necessary to treat the offence in question as an offence of absolute liability and that 'honest and reasonable belief, *albeit* an erroneous one' is not a valid defence. The possible conviction of a blameless person, a person who does not have the necessary *mens rea* to commit a criminal offence, is not a relevant concern."[130]

131. The suggestion that it is acceptable to convict blameless persons as the price of securing conviction of the guilty is unpalatable, especially if the means exist to avoid such a lamentable outcome.

132. At one stage, the majority suggested that the defence might be applicable in limited circumstances, stating:

"...the common law defence of honest and reasonable mistaken belief, ... even if arguable, only applies when the act or omission complained of relates not to the intrinsic nefarious character of

an article or equipment over which a defendant can have no control, either personally, or through an agent or a servant. The gondola does not fall within such a category."[131]

133. As it stands, it is a mystifying statement. It would make substantial sense if the word "not" after "relates" in the second line were deleted. It would then propose that the defence should only be available where the defendant is not at fault because the apparent breach is attributable to an inherent defect in the equipment over which he has no control. That is precisely the kind of situation catered for by the intermediate defence. However, with the word "not" in place, the statement appears to rule out the defence precisely where it has a proper role to play, making it unclear when, if at all, its operation is envisaged.

134. In my view, Stock JA's approach was sound and to be preferred over that of the majority. His Lordship held that on a proper construction of the statute, the presumption of *mens rea* had been displaced.[132] He turned then to consider whether the halfway house defence embraced by *Fong Chin Yue* was applicable to the case at hand and concluded that it was not, stating:

"Whether such a halfway house defence is available is a matter of instance-specific statutory construction, with keen regard to the words used and the subject matter. In the present instance, the words used and the context do not in my judgment allow of such a defence. The words used impose a non-delegable duty. To point to the negligence of others (in this case the competent person appointed by the owner) is to do no more than to contend that the duty is delegable."[133]

135. In the court below in the present case, Deputy Judge Line excluded "the so-called common law defence" in the present case on the broad basis that *Shun Tak* had confirmed its inapplicability "to safety legislation".[134] For the reasons given above, that suggestion cannot be supported.

J.6 The alternatives available under Hong Kong law

136. The foregoing analysis leads to the conclusion that, as a matter of general Hong Kong law, four possibilities exist regarding the mental requirement attaching to any particular statutory offence or to any particular external element of a statutory offence. It may require proof of *mens rea* (the first alternative referred to in Section I above) or, where the presumption of *mens* rea is displaced, it may recognize an intermediate defence where the accused proves an exculpatory honest and reasonable belief on a balance of probabilities (the third alternative); or the defences available to the accused may be limited to those expressly provided by the statute (the fourth alternative) or, finally, it may be an offence of absolute liability (the fifth alternative).

137. There is no class of "safety legislation" offence which automatically excludes the third alternative. In so far as *HKSAR v Hyundai Engineering Construction Co Ltd*[135] and *HKSAR v Shun Tak Properties Ltd*,[136] held to the contrary, they were wrongly decided. The decision of the Judge in the court below was erroneous to the like extent.

K. Deciding among the alternatives

138. I turn then to examine how the choice is made among the alternatives. Starting with the

presumption of *mens* rea, one first asks: is the presumption displaced? If it is, the next question is: By which alternative is it displaced? Some of the considerations and factors which may assist in answering those two questions are discussed below. It is obviously not intended to suggest that the matters mentioned below are in any way exhaustive.

K.1 Considerations relevant to whether the presumption is displaced

139. As Lord Scarman emphasised, the presumption of *mens rea* "can be displaced only if this is clearly or by necessary implication the effect of the statute".[137]

140. The first consideration is therefore the statutory language. The text may be crucial. As noted above, the statute may employ adverbs like "knowingly" or "negligently"; or it may use verbs or nouns which may or may not have connotations of awareness or intent on the defendant's part. Thus, the *mens rea* connotations of "possession" were discussed in *R v Warner*;[138] and in *He Kaw Teh v The Queen*,[139] Gibbs J held that "import" does not carry its own connotation of knowledge or intention.

141. The nature and subject-matter of the offence are also of great importance in deciding whether *mens rea* is required. The more serious the offence in terms of penalty and social obloquy, the less likely it is that the presumption will be held to have been supplanted.[140] One should be slow to attribute to the legislature the intention of inflicting severe punishment and stigmatising a person as a serious criminal unless he is proved to have acted with a guilty mind. There are of course exceptions involving serious offences where the presumption has been held to have been displaced in favour of the third, fourth or fifth alternatives, discussed below.

142. There is generally less need to feel inhibited about overriding the presumption in relation to what may compendiously be called "regulatory offences". Lord Reid gave some examples of such offences which, in the English context, were held to impose absolute liability :

"... there is a long line of cases in which it has been held with regard to less serious offences that absence of *mens rea* was no defence. Typical examples are offences under **public health**, licensing and industrial legislation. If a person sets up as say a butcher, a publican, or a manufacturer and exposes unsound meat for sale, or sells drink to a drunk man, or certain parts of his factory are unsafe, it is no defence that he could not by the exercise of reasonable care have known or discovered that the meat was unsound, or that the man was drunk or that his premises were unsafe."[141]

Where a halfway house option exists, displacement of the presumption might well lead to such offences being dealt with on an intermediate basis of liability instead.

143. The legislative purpose is obviously important. If, in the light of the nature and subject-matter of the offence, construing the provision to require full *mens rea* would make successful prosecution so unlikely that the statutory objectives would be frustrated, this must be given weight. Where this is a legitimate consideration, the response should often be to consider whether the adoption of an intermediate basis of liability accords with the true legislative

intention.

144. Having considered the statutory language and purpose broadly, as indicated above, the conclusion may be in favour of the first alternative, that is, that the presumption of *mens rea* has not been displaced and that proof of *mens rea* is required. If the presumption is overridden, one goes on to consider the other alternatives. It is convenient to begin by discussing factors which may favour either absolute liability (the fifth alternative) or the defence approach (the third alternative), before looking at the effect of statutory defences (the fourth alternative) on those other alternatives.

L. Absolute liability

145. As Lord Diplock reminds us, the court may sometimes "feel driven to infer an intention of Parliament" to impose absolute liability notwithstanding the potentially Draconian consequences, but "such an inference is not lightly to be drawn".[142] This is all the more so where the possibility of construing the enactment as importing an intermediate basis of liability exists.

L.1 "Quasi-criminal" offences

146. The view is taken in some of the decided cases that it is acceptable as a matter of policy to impose absolute liability in relation to regulatory offences even if this causes some injustice. Such offences were, for example, described by Day J as: "are not criminal in any real sense, but acts which in the public interest are prohibited under a penalty".[143] And in *Tolson*,Wills J suggested:

"There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest."[144]

147. Having listed the typical examples noted above, Lord Reid in *Warner* continued:

"... it is no defence that he could not by the exercise of reasonable care have known or discovered that the meat was unsound, or that the man was drunk or that his premises were unsafe. He must take the risk and when it is found that the statutory prohibition or requirement has been infringed he must pay the penalty. This may well seem unjust, but it is a comparatively minor injustice and there is good reason for it as affording some protection to his customers or servants or to the public at large. ... These are only quasi-criminal offences and it does not really offend the ordinary man's sense of justice that moral guilt is not of the essence of the offence."[145]

148. While the impact of a conviction for such an offence is comparatively slight, the regulatory nature of an offence is, in my view, not in itself a sufficient basis for imposing absolute liability, particularly where a middle course exists. It remains in principle objectionable for someone who behaved honestly, reasonably and without social blameworthiness nevertheless to suffer conviction of a criminal offence.

L.2 The Lim Chin Aik principle supplemented

149. Even though the offence may be minor, it is necessary to justify the imposition of absolute liability on the basis that this serves some useful purpose. This important principle was laid down by the Privy Council in *Lim Chin Aik v The Queen*[146] where Lord Evershed (referring to absolute liability as "strict liability") stated:

"But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."[147]

150. This has been widely adopted.[148] In *Gammon*, Lord Scarman stated (again using the term "strict liability" for what I have been calling "absolute liability"):

"Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended." [149]

151. *Lim Chin Aik*, like *Gammon* are Privy Council decisions arrived at in the English context with no consideration of any halfway house. Given the possibility of an intermediate basis of liability offered by the third alternative in Hong Kong, the principle enunciated by Lord Evershed and Lord Scarman should be supplemented by an additional condition: before concluding that the offence is one of absolute liability, the court should first determine whether the statutory purpose can sufficiently be met by construing the statute as creating an offence subject to the intermediate defence. Absolute liability should only be resorted to if the answer is in the negative.

L.3 Situations when absolute liability might be imposed

152. Two situations come to mind (others may obviously exist) where absolute liability might in principle be imposed in accordance with the principle stated in *Lim Chin Aik*, supplemented as suggested above.

153. The first is where the law does not consider the conduct in question to be essential or even necessarily acceptable from a societal point of view. These are situations where the policy of the law is that the persons concerned can properly be required to abstain from such conduct unless the conditions which would render it lawful and acceptable are unmistakeably established. If such persons go ahead with such conduct anyway, they do so at their peril should it turn out that, contrary to whatever they may have actually believed – or even reasonably believed – the

circumstances render their conduct criminal. They act at their own peril.

154. An obvious example involves men having sexual intercourse with under-aged girls, an area where absolute liability has been imposed in many jurisdictions even though the offence is serious and carries severe penalties. As Bokhary and Chan PJJ put it in *So Wai Lun v HKSAR*:[150]

"The deterrent effect of the criminal law is not confined to deterring people from doing what they know is unlawful. It also encourages them to take care to avoid what may be unlawful. This idea is captured in the expression, used in the *Noise Control Authority v Step In Ltd* (2005) 8 HKCFAR 113 at p 120H, 'steer well away from the line between legality and illegality'. In the context of s 124, care to avoid what may be unlawful and steering well away from the line between legality and illegality would add materially to the protection for young girls which the section provides."

155. In *He Kaw Teh v The Queen*,[151] Brennan J put the point in this way:

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

156. A second class of cases where absolute liability may have a justifiable utility involves the statutory imposition of a duty on a person (which may be a corporate body) where the conduct or task which is the subject of the duty is in practice likely to be carried out by someone else, such as an employee or a contractor. Such situations are commonplace in factories and other workplaces where the legislation places the duty on the owner of the enterprise or the employer concerned. For convenience I shall simply speak of "the employer".

157. To construe the offence-creating provision in such a situation as requiring proof of *mens rea* may make little sense. The job having been assigned to an employee or contracted out, the employer may truthfully know nothing about the conduct and circumstances constituting the breach. The intermediate defence may not be enough to secure the statutory purpose. The employer may plausibly say that he took all reasonable care to entrust the task to a competent employee or specialist contractor and honestly and reasonably believed that the duty was being properly discharged.

158. The justifiable effect of imposing absolute liability in such cases is that it makes it insufficient for the employer passively to assert an honest and reasonable belief. It promotes proactive management and diligent supervision on his part to see that the duty is in fact being

properly discharged. If the employer knows that he will be held to account, even without actual fault on his part, if his contractor or employee is slack or careless or incompetent on the job, he has every incentive to make sure that the job is properly done and to replace contractors or employees who are not up to the task.

159. Devlin J explains this policy as follows:

"Thus a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark. Although, in one sense, the citizen is being punished for the sins of others, it can be said that, if he had been more alert to see that the law was observed, the sin might not have been committed."[152]

M. The intermediate basis of liability

160. Regulatory offences do not as a rule involve conduct falling within the first of the aforementioned categories where absolute liability may be justified. The conduct being regulated generally forms an essential part of social life – the provision of food and drink, the operation of machinery, working on construction sites, selling pharmaceuticals and so forth. The policy of the law is not to say: "Proceed with these activities at your peril", but to say: "When doing these things, you must meet proper standards aimed at promoting **public health**, safety and well-being".

161. Nevertheless, many regulatory offences may fall within the second category discussed in the preceding Section. The legislative policy underlying the regulatory offence may justifiably be to require diligent proactive management or supervision on the part of the person subjected to the duty. But in other cases, the policies underlying regulatory offences are likely to be best reflected by construing the offences as falling within the third alternative, founding liability on the absence of due diligence or the absence of honest and reasonable belief. Absolute liability in such cases is likely to serve no additional purpose while carrying the disadvantages discussed above.

162. It follows that where the presumption of *mens* rea is held to have been displaced the court should regard the third alternative as applicable unless the conclusion that the legislative intent requires absolute liability to be imposed is compelling.

N. Exclusionary statutory defences

163. The effect of any statutory defences applicable to the offence charged is obviously important where the presumption of *mens rea* relating to the offence-creating provision is displaced. This has been discussed in Section H of this judgment and can be briefly dealt with here.

164. The key question is whether the statutory defence, properly construed, is inconsistent with the availability of the third alternative. If so, only the statutory defence can be relied on. As discussed above, *Tolson* illustrates the situation where the statutory defence is not inconsistent,

covering different facts and being wider than the defence of honest and reasonable belief.

165. On the other hand, as Lord Steyn points out, section 6 of the Sexual Offences Act 1956 provides an example of legislation where the statutory defence does exclude by necessary implication any more general defence of honest and reasonable belief. Thus, by section 6(1) it is an offence for a man to have unlawful sexual intercourse with a girl under the age of sixteen. But section 6(3) – the "young man's defence" – provides:

"A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offence, *and he believes her to be of the age of sixteen or over and has reasonable cause for the belief*."

166. The italicised words overlap the common law defence. The legislature was necessarily implying that it is not enough for an accused simply to say that he honestly and reasonably believed that the girl was over 16. He has additionally to show that he was under 24 at the time. The common law defence is excluded in favour of a statutory defence which imposes further requirements.

O. The principles applied to the section 54(1) offences in this case

O.1 The presumption displaced

167. The relevant PHMSO provisions are set out in Section B of this judgment. Mr Gerard McCoy SC,[153] accepts that the presumption of *mens rea* has been displaced in relation to section 54(1). In my view, that concession is correctly made. The provision is silent as to any mental requirement but the nature of the offence is such that a prosecutor will very rarely be in a position to prove that the seller knew of a drug's unfitness. The legislative purpose of protecting the public from being sold unfit drugs would tend to be defeated if section 54(1) were construed to require proof of *mens rea* in respect of the unfitness. It is therefore necessary to consider what alternative basis of liability was intended.

O.2 The issues in respect of section 54(1)

168. Mr McCoy's contention is that section 54(1) should be read as importing the third alternative, giving the appellants a defence if they are able to prove on a balance of probabilities that they honestly and reasonably believed that there was nothing wrong with the medicine prescribed. Since Deputy Judge Line wrongly excluded this defence and held that section 54(1) was an absolute offence, Mr McCoy contends that the convictions cannot stand and that they should either be quashed or a retrial ordered so that the third alternative can be explored.

169. The contest has been between the third alternative contended for by Mr McCoy and the fourth alternative advocated by Mr Kevin Zervos SC.[154] The question in particular is whether the defences available to the appellants are confined to those contained in sections 70 and 71 of the PHMSO. In either case, the factual question is whether on the material before the Court, the appellants come within, or may arguably come within, whichever defence is available, so as to

justify quashing the convictions or ordering a retrial. Obviously if in law no defences avail them or if there is factually no real prospect of engaging a defence, the appeals must be dismissed.

O.3 Are sections 70 and 71 available statutory defences?

170. A preliminary argument advanced by Mr McCoy is that sections 70 and 71 should, for several reasons, not be treated as available at all.

171. Section 70 is somewhat unusual since it gives a defendant a defence if he proves that his contravention was due to the act or default of some identified third person (as well as proving his own due diligence, to which I shall return). Mr McCoy submits that this casts the defendant in the role of a prosecutor who must prove the third person's fault beyond reasonable doubt. Section 70 makes this clear, he argues, by providing that if the defendant proves the fault of the third person "that other person may be convicted of the offence". Mr McCoy's proposition is that by placing a burden on the accused to prove an exculpatory fact beyond reasonable doubt in order to escape conviction, section 70 is unconstitutional on various grounds. It therefore cannot form part of any third alternative.

172. I do not accept that argument since in my view, Mr Zervos is right when he submits that properly construed, section 70 does not impose a burden to prove the third person's fault beyond reasonable doubt.

173. Section 70's principal aim is to provide a defence. It does this by requiring the accused to prove not merely the fault of the third person but also "that he has used all due diligence to secure that the provisions in question were complied with". The standard of proof for that second limb is plainly the balance of probabilities and it is most implausible that a different standard of proof is intended to apply to the first limb of what is a single defence. The provision that "if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person that other person may be convicted of the offence" tells against Mr McCoy's submission. As Mr Zervos points out, the word "may" shows that the magistrate is permitted to, but need not, convict the third person. He makes his choice *after* he is satisfied that "the original defendant proves that the contravention was due to the act or default of that other person". It is therefore envisaged that the magistrate may find that a defendant has discharged his burden on a balance of probabilities but entertain a reasonable doubt as to the criminal liability of the third person and so decline to convict him.

174. Mr McCoy also suggests that sections 70 and 71 should not be regarded as constituting the third alternative because of the narrowness or difficulty of bringing oneself within their terms. I reject that submission firstly because I do not accept his construction of the relevant requirements of those defences and, more importantly, because the narrowness of available defences is quite beside the point in the present context. These matters can be briefly dealt with.

175. It was submitted that section 70 becomes virtually a dead-letter whenever the original defendant is charged (as in the present case) near the end of the six-month limitation period for summary offences imposed by section 26 of the Magistrates Ordinance.[155] It was argued that a like limitation period must also avail the third person (potentially Christo in the present case) so

that the appellants would have been out of time if they had sought to rely on section 70 by laying an information against Christo. In my view, that argument is unwarranted. As stated above, section 70 functions primarily as a defence and expressly *entitles* the original defendant to bring the third person before the court on giving to the prosecution not less than 3 clear days' notice. It does so as primary legislation dealing with a specific defence and is not cut down by the general provisions of the Magistrates Ordinance. If delay in bringing the third party before the court means that conviction of the third person would be unfair, the magistrate's only proper course might be to decline to convict. The availability of the statutory defence to the original defendant is unaffected.

176. In relation to section 71, Mr McCoy sought to argue that the requirement that the substance sold by the defendant be in "the same state as when he purchased it" renders the defence virtually nugatory since even opening the CM 10mg/5ml bottle delivered by the supplier changes "the state" of that substance and rules out the defence. That argument is unwarranted and based on a misreading of *Milk Marketing Board v Hall*[156] where milk was held no longer to be in the same state as when purchased, not merely because the container had been opened, but because the buyer had gone on to pasteurise the milk. No such change of state arises here.

177. But more importantly, whether a statutory defence is narrow or wide, or easy or difficult to invoke, is nothing to the point. The question is whether, on its true construction, the statutory defence is inconsistent with the concurrent availability at common law of the intermediate defence. The "young-man's defence" may no doubt be considered unattainably narrow by male accused persons aged 24 and above, but it demonstrates that the statutory intention is clearly to exclude the intermediate defence.

O.4 Are sections 70 or 71 inconsistent with the third alternative?

178. As noted above,[157] the appellants' case is that they are not responsible for the contamination which they say must have taken place before delivery to them by Christo, a long-standing and trusted supplier on whom they are entitled to rely. Both sections 70 and 71 cater for precisely such a case. In my view, they overlap with, and by necessary implication exclude, the common law intermediate defence represented by the third alternative.

179. Section 70 allows the appellants a defence if they can show that the contravention of section 54(1) was due to the act or default of Christo *and* if they can further prove that they used all due diligence to secure that section 54(1) was complied with. It is true that decided cases exist[158] where "due diligence" defences have been distinguished from defences based on "mistaken but honest and reasonable belief". I accept that the concepts are distinct and may in certain circumstances operate differently, but their application involves an overlap sufficient to indicate an exclusionary legislative intent for present purposes. Thus, when section 70 requires the accused to prove that he has used all due diligence to secure compliance with section 54(1), it can only mean that the accused must, by taking all reasonable steps, arrive at the situation where, when making the sale, he honestly and reasonably believes that the medicine is fit for use by man. Because the legislature has imposed additional requirements before the statutory defence can operate – that the third person be brought before the court and that the contravention be proved to be due to his act or default – this shows that invoking the third alternative without

satisfying those additional conditions cannot serve as a defence to section 54(1).

180. The same applies to section 71. It is a defence which is especially apposite where, as in the present case, the defendant says: “I bought it from a reputable supplier and was entitled to rely on his warranty that the substance which I subsequently sold was fit for human use”. That is precisely what the appellants are saying in the present case.

181. Section 71 establishes a practical defence. It provides[159] that:

“... a name or description entered in an invoice shall be deemed to be a written warranty that the article or substance to which the entry refers can be sold ... under that name or description by any person without contravening any of the provisions of this Part [including section 54(1)].”

182. Accordingly, in a section 54(1) case like the present, provided that the procedural requirements[160] laid down by section 71 are met and assuming that the substance in question can lawfully be sold under the name used,[161] the defendant has a defence if (i) he produces the invoice which refers to the medicine which was sold and found to be unfit, thus establishing the deemed warranty of fitness by the supplier; (ii) he proves “that he had no reason to believe at the time of the commission of the alleged offence that it was [otherwise than fit for use by man]”; and (iii) that the substance sold “was then in the same state as when he purchased it.”

183. Condition (ii) clearly overlaps substantially with the third alternative. In stipulating the additional conditions, particularly the requirement of a written warranty from the supplier deemed to be given by an invoice describing the goods in question and the requirement that the goods remain in the same state at the time of sale, the legislative intent plainly is to regard an honest and reasonable belief that the medicine was fit for human use as insufficient.

184. It follows that on the true construction of section 54(1)(a), the presumption of *mens rea* is displaced, and where the *actus reus* of selling contaminated medicine is proved, the only defences available are the statutory defences contained in sections 70 and 71.

O.5 Can the statutory defences be made out factually?

185. Mr McCoy invited the Court to regard all the findings of the Magistrate as having been vitiated by his erroneous conclusion that the contamination had been deliberate. I do not consider that justified. It has not been suggested that he made any errors in making the primary findings. As pointed out above, the Magistrate’s mistake lay in the unwarranted inferences he drew on the basis of those findings. The Court is therefore able to consider those findings in deciding whether the appellants come within the statutory defences and if not, whether it should order a retrial for the 1st appellant to allow him to raise those defences.

186. Before looking at the position common to both appellants, a point relating to the 2nd appellant alone should be dealt with. It was a point that arose from questions from the Bench, namely, whether there was a proper basis for treating the 2nd appellant as someone who had “sold” the contaminated medicine for the purposes of section 54(1). The facts were not evident from the Magistrate’s findings but the Court was supplied with a transcript of the 2nd appellant’s

evidence with the consent of the parties. Having considered the transcript, the factual position is clear. There was *de facto* a separation between the provision of the 1st appellant's medical services and the provision and sale of the medicines prescribed. After the patient's consultation, the 1st appellant would write a prescription and, in a separate part of the clinic, the 2nd appellant would fill the prescription and transfer the medicine to the patient (or the children's parents or guardians in this case) for payment. It cannot, in my view, be doubted that she comes within section 73 as a person who sold the medicine as the servant or agent of the 1st appellant. Both appellants are therefore deemed by section 73 to have performed the act of selling under section 54(1)(a).

187. There was some discussion as to whether there is any social utility in imposing liability on a person in the 2nd appellant's position, acting as an assistant in a doctor's clinic. In my view such utility clearly exists. The self-evident policy is to promote **public health** and safety by imposing a regime of diligence and care to avoid supplying medicines which are unfit for use. Doctors will commonly rely on their nurses or clinical assistants to place orders for medicines kept in stock, to prepare them for use and to dispense them to patients. Doctors are seldom if ever likely to be concerned in ensuring that the medicines delivered properly match those ordered; that they come from reputable sources and are properly prepared for use by patients. The imposition of such liability promotes careful handling of the medicines by the assistant and diligent supervision by the doctor.

188. In my view, perhaps unsurprisingly since sections 70 and 71 were never invoked below, there is no basis for thinking that the appellants are able to discharge the burden of bringing themselves within either of the statutory defences or that the 1st appellant has any reasonable prospect of doing on any retrial.

189. Two factual assertions are central to the appellants' case: (i) that the CM 10mg/5ml delivered in the 3.6 litre bottles from which the medicine prescribed originated were supplied by Christo; and (ii) that the contaminant was not introduced at the clinic but must have been introduced on Christo's watch. Moreover, for the 1st appellant to rely on section 71 on any retrial, he would have to produce an invoice issued by Christo covering the CM 10mg/5ml sold, in order to meet the requirement of a written warranty of fitness.

190. The appellants do not come close to proving those matters. First, as to whether the drug came from Christo:

(a) Christo's labels carry Christo's name; are coloured red, white and green; and state the registration number for the drugs concerned. However, the labels on the four 3.6 litre bottles do not mention Christo; are white in colour; and state no registration number.

(b) Three invoices issued by Christo produced by the 1st appellant were dated 18 June 2005, 21 September 2005 and 9 November 2005 respectively. Two were for four and one was for five 3.6 litre bottles of "Antimine Forte syrup". The Magistrate found, based on the evidence, that such syrup was a pharmaceutical product registered by Christo containing Chloropheniramine at a concentration of 4mg/5ml. An exhibit[162] consisting of a printout dated 6 September 2006 of an online search of the Department of Health's list of Registered Pharmaceuticals additionally

listed “Antimine Syrup” (without the word “Forte”) with a different registration number in Christo’s name at a concentration of 2.5mg/5ml.

(c) The Magistrate found that those three invoices do not relate to the four 3.6 litre bottles of CM 10mg/5ml from which the medicine sold was said to have originated. That finding is well supported and eliminates reliance on section 71. The invoices, referring to “Antimine Forte Syrup” obviously do not match the labels on the four bottles which describe their contents as “Chloropheniramine Maleate 10mg/5ml”. As the existence of different registration numbers for the syrup at concentrations of 4mg/5ml and at 2.5mg/5ml indicate, the drug at a concentration of 10mg/5ml is for relevant purposes a different medicine. Moreover, as the Magistrate found, the frequency of ordering indicated by the three invoices suggests a consumption rate of four or five 3.6 litre bottles every three months or so. The last invoice was dated 9 November 2005 whereas the sales for which the appellants were charged occurred between 16 August 2006 and 4 September 2006, some eight months later. The Magistrate’s inference that the drugs supplied under the three invoices would have been “used up well before” the relevant sales is therefore justified.

191. It must follow that it cannot be shown that Christo was responsible for the contamination. The evidence is in any case against such a conclusion. It was formally admitted that there was no contaminant in any of the four 3.6 litre bottles of CM 10mg/5ml. It was also found that there was no contaminant in the 500 ml vessel into which the CM 10mg/5ml was decanted to be used for filling the four small bottles provided to the patients. Yet the four small bottles were found to contain 43%, 11%, 11% and 1% of the contaminant respectively. This evidence justifies the inference that the contamination occurred at the clinic and not further up the supply chain, removing any basis for a section 70 defence.

192. Since the only defences open to the appellants are not factually available, the appeal against the section 54(1) convictions must be dismissed.

P. The offence under regulation 36(1)

193. It is not in dispute that the four 3.6 litre bottles of CM 10mg/5ml were not registered with the Pharmacies and Poisons Board. Nor can it be disputed that they were in the 1st appellant’s possession at his clinic for the purposes of sale. The conditions of liability in regulation 36(1) were therefore satisfied and to escape liability the 1st appellant had to rely on regulation 36(1C) and to show “that he did not know and could not with reasonable diligence have discovered” the lack of registration.

194. It is clear, to the extent if any that it differs from the common law intermediate defence, that this statutory defence is inconsistent with the concurrent availability of the third alternative. The contrary was not argued.

195. The Judge and the Magistrate both held that the 1st appellant was unable to satisfy the second of regulation 36(1C)’s two requirements. Even assuming that he did not know that the CM 10mg/5ml was unregistered, there was no basis for suggesting that the 1st appellant could

not with reasonable diligence have discovered the deficiency.

196. In my view, those decisions were correct. The argument advanced in purported answer to the charge was essentially that since Christo was a reputable, long-standing and trusted supplier, the 1st appellant was entitled to assume that there had been due registration with the Board. Quite apart from the factual difficulty it faces – namely, that the four bottles concerned were found not to have been supplied by Christo – the argument does not confront the second condition of the regulation. Merely to assert an entitlement to assume due registration does not amount to showing that the 1st appellant could not with reasonable diligence have discovered its absence. It is clear that the discovery *could* have been made with reasonable diligence. Inspecting the label would have shown that there was no registration number, a fact that ought at least to have raised suspicions. An inquiry of the Department of Health or a visit to its website would have provided the necessary information. Even proceeding on the assumption that Christo had supplied the drugs, an inquiry of Christo would have revealed that it had no registration for CM 10mg/5ml (as opposed to "Antimine Forte syrup" 4mg/5ml).

197. It follows that the appeal against conviction under regulation 36(1) must also be dismissed.

Q. Conclusions

198. My conclusions may be summarised as follows:

(a) Although I would affirm the convictions on different grounds, the Judge was wrong to hold, following the Court of Appeal's decision in *HKSAR v Shun Tak Properties Ltd*,[163] that the common law defence of honest and reasonable belief is never available where the offence charged involves safety legislation.

(b) The proper starting-point for ascertaining the mental requirements of any statutory offence or any external element of such an offence is to presume that the prosecution must prove *mens rea* in respect thereof. That presumption may be displaced expressly or by necessary implication. If it is not displaced, the *mens rea* requirement persists.

(c) If the presumption is displaced, three possible alternatives arise under Hong Kong law, namely whether the legislative intent is:

(i) to allow a defence if the defendant can prove on the balance of probabilities that the prohibited act was done in the honest and reasonable belief that the circumstances were such that, if true, he would not be guilty of the offence (the third alternative); or

(ii) to confine the defences open to the accused in relation to his mental state to the statutory defences expressly provided for in relation to the offence charged (the fourth alternative); or,

(iii) to make the offence one of absolute liability so that the prosecution succeeds if the accused is proved to have performed or brought about the *actus reus*, regardless of his state of mind (the fifth alternative).

(d) In the present case, the presumption of *mens rea* is displaced in relation to section 54(1)(a)'s requirement that the medicine sold be unfit for human use. The offence comes within the fourth alternative since the legislative intent is to confine the defences available to those contained in sections 70 and 71 of the PHMSO, such defences being inconsistent with the concurrent availability of the third alternative.

(e) The appellants have not brought themselves factually within either of those sections and the 1st appellant has no reasonable prospects of being able to do so even if given an opportunity to attempt this on a retrial.

(f) Prima facie liability is plainly established under regulation 36(1) and the 1st appellant cannot establish a defence under regulation 36(1C) as he is unable to show that he could not have discovered with reasonable diligence that the CM 10mg/5ml in his possession had not duly been registered.

199. I would accordingly dismiss the appeals.

Mr Justice Litton NPJ :

200. I agree that the appeals fail and must be dismissed.

The section 54(1)(a) offences

201. Where a statute creates an offence, the ingredients of that offence are to be found within the four corners of the statute. And where the statute prescribes in express terms the elements of a defence to the charge - as it does here in sections 70 and 71 of the **Public Health and Municipal Services Ordinance**, Cap. 132 – it leaves little room for implying the existence of a common law defence. At the end of the day it is simply a matter of statutory construction.

202. In construing legislation, it is unhelpful to make sweeping generalizations as if offences under **public health**, licensing and industrial undertaking legislation fall into a special class which require the imposition of absolute liability. This is to make far too much of Lord Reid's remark in *R v Warner [1969] 2 AC 256 at 271 H* where he said:

"…there is a long line of cases in which it has been held with regard to less serious offences that absence of *mens rea* was no defence. Typical examples are offences under **public health**, licensing and industrial legislation. If a person sets up as say a butcher, a publican, or a manufacturer and exposes unsound meat for sale, or sells drink to a drunk man or certain parts of his factory are unsafe, it is no defence that he could not by the exercise of reasonable care have known or discovered that the meat was unsound, or that the man was drunk or that his premises were unsafe."

203. Lord Reid was there simply giving examples of where, under the relevant legislation, properly construed, that was the result.

204. In the court below the deputy judge referred to *HKSAR v Shun Tak Properties Ltd* [2009] 3

HKLRD 299 and said that the Court of Appeal had held there that "the so-called common law defence had no application to safety legislation". This statement is far too broad.

205. The legislation there concerned was the *Factories and Industrial Undertakings (Suspended Working Platforms) Regulation* made under the *Factories and Industrial Undertakings Ordinance*, *Cap. 59*. The charge was against the owner of a gondola (at Shun Tak Centre) for failing to ensure that the gondola (used for carrying persons) was properly maintained, contrary to Reg. 4(e). The fact that the gondola had not been properly maintained was proved beyond doubt. But the owner of the building (and of the gondola) said: "The duty of proper maintenance had been delegated to competent maintenance contractors; we reasonably believed that they had done their job properly; hence we are not liable". Assuming that the owner's belief was credible, the question for the court was simply this: Upon a proper construction of the statute, was the duty of proper maintenance delegable?

206. Under Reg. 4(e) the duty of ensuring proper maintenance fell on the "owner". That word is broadly defined in Reg. 3 to comprise a large category of persons, including overseers, foremen etc, in relation to whom the question of delegation of the duty of maintenance could not possibly arise. It is therefore clear that the legislative intent in Reg. 4 was to impose absolute liability. The result in *HKSAR v Shun Tak Properties Ltd* is to be reached by a proper construction of the statutory scheme and not by the fact that the statute concerned was "safety legislation". That much is clear from Stock JA's judgment, whose approach is much to be preferred to the wider generalizations in the joint judgment of Stuart-Moore VP and Yeung JA.

207. Here we are concerned with charges under s.54(1)(a) of the ***Public Health and Municipal Services Ordinance***, *Cap. 132* for selling drugs unfit for human consumption. The 2nd appellant was the servant and agent of the 1st appellant. Section 73 provides that "every person shall be deemed to sell…..any…..drug for use by man, who sells…..such…..drug either on his own account or as the servant or agent of some other person, and, where such person is the servant or agent of some other person, such other person shall…..be under the same liability as if he had himself sold…..such…..drug".

208. It is perfectly clear on the facts of this case that, on 4 September 2006, the 2nd appellant, on the 1st appellant's instructions, sold the drugs and collected $230 from the patient's mother. Hence they were both guilty as charged.

The offence under regulation 36(1) of the Pharmacy and Poisons Regulations Cap. 138

209. I have had the advantage of reading in draft Ribeiro PJ's judgment on this aspect of the case. I agree with it and have nothing to add.

Lord Hoffmann NPJ :

210. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Bokhary PJ :

211. The doctor's appeal is unanimously dismissed while the assistant's appeal is dismissed by a majority, with myself dissenting.

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(R A V Ribeiro)
Permanent Judge

(Henry Litton)
Non-Permanent Judge

(Lord Hoffmann)
Non-Permanent Judge

Mr Gerard McCoy SC and Mr Douglas Jones (instructed by Messrs Richards Butler) for the appellants

Mr Kevin Zervos SC and Ms Vinci Lam (of the Department of Justice) for the respondent

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[1] Cap 132.

[2] Cap 138.

[3] [2009] 3 HKLRD 299.

[4] Part V which covers section 54(1).

[5] [2009] 3 HKLRD 299.

[6] "Act" is used in this judgment to cover any "omission" or "state of affairs" which may constitute a relevant statutory offence.

[7] Theft Ordinance (Cap 210), section 11.

[8] Although in the Canadian Supreme Court in *R v City of Sault Ste Marie* [1978] 85 DLR (3d) 161 at 182, Dickson J suggested that the presumption does not apply to regulatory offences which are silent as to the requisite mental element although "the principle that punishment should in general not be inflicted on those without fault applies". This is discussed further later in this judgment.

[9] See eg, *Sherras v de Rutzen* [1895] 1 QB 918 at 921; *Brend v Wood* (1946) 175 LT 306, 307; *Sweet v Parsley* [1970] AC 132 at 148, 152; *Gammon (Hong Kong) Ltd. v Attorney General of Hong Kong* [1985] 1 AC 1 at 14; *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 at 460.

[10] [2002] 1 AC 462 at 477, §32.

[11] [1984-1985] 157 CLR 523 at 568-571.

[12] See, eg, *R v Tolson* (1889) 23 QBD 168 at 181; *Lim Chin Aik v The Queen* [1963] AC 160 at 172-173; *He Kaw Teh v The Queen* [1984-1985] 157 CLR 523 at 566; *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] 1 AC 1 at 14; *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 at 460.

[13] (1889) 23 QBD 168.

[14] Lord Coleridge CJ, Hawkins, Stephen, Cave, Day, A L Smith, Wills, Grantham and Charles JJ forming the majority and Denman, Field, Manisty JJ and Pollock and Huddleston BB being the dissenters.

[15] At 181.

[16] [1895] 1 QB 918.

[17] At 921.

[18] [1897] AC 383 at 389-390.

[19] [1899] 1 QB 20.

[20] David Ormerod, *Smith and Hogan, Criminal Law* (OUP 12th Ed) at p 176.

[21] At 25-26.

[22] [1963] AC 160 at 173.

[23] [1935] AC 462 at 481.

[24] Except in cases of insanity and where statute lays down otherwise.

[25] [1969] 2 AC 256.

[26] At 302.

[27] At 303.

[28] [1970] AC 132.

[29] Dangerous Drugs Act 1965, section 5.

[30] At 150.

[31] At 157-158.

[32] [2000] 2 AC 428.

[33] At 462.

[34] (1889) 23 QBD 168.

[35] [1895] 1 QB 918.

[36] [1897] AC 383 at 389-390.

[37] (1934) 52 CLR 100.

[38] At 105.

[39] At 109.

[40] (1937) 59 CLR 279.

[41] At 302.

[42] At 305.

[43] (1941) 67 CLR 536.

[44] At 541.

[45] [1984-1985] 157 CLR 523.

[46] Consisting of Gibbs, Mason, Brennan and Dawson JJ. Wilson J dissented.

[47] At 529, 534

[48] [1970] AC 132 at 164.

[49] At 534.

[50] (1934) 52 CLR 100.

[51] At 534.

[52] At 574.

[53] At 592-593.

[54] [1984-1985] 157 CLR 523 at 579.

[55] [2000] 2 AC 428 at 462.

[56] [1978] 85 DLR (3d) 161.

[57] At 175.

[58] [1986] 1 NZLR 660 at 666.

[59] [1978] 85 DLR (3d) 161.

[60] At 170.

[61] At 171-172.

[62] At 172.

[63] At 181-182.

[64] (1905) 25 NZLR 709.

[65] Per Williams J at 725-726 and Edwards J at 731.

[66] [1970] NZLR 909 at 915.

[67] At 916.

[68] [1976] 1 NZLR 571.

[69] At 586.

[70] [1980] 1 NZLR 51.

[71] [1983] NZLR 78.

[72] At 85.

[73] *Ibid*.

[74] [1986] 1 NZLR 660.

[75] At 668.

[76] *Ibid*.

[77] Section D.1.

[78] (1889) 23 QBD 168 at 183.

[79] [1969] 2 AC 256 at 312.

[80] [2002] 1 AC 462 at 478.

[81] [2004] 3 HKC 304.

[82] At 330, §74.

[83] At 331, §76.

[84] [1985] 1 AC 1 at 14.

[85] *Ibid*.

[86] (2006) 9 HKCFAR 530.

[87] Cap 200.

[88] At 542-543, §§39 and 40.

[89] *Sweet v Parsley* [1970] AC 132 at 150.

[90] In *Maher v Musson* (1934) 52 CLR 100 at 109.

[91] *He Kaw Teh v The Queen* [1984-1985] 157 CLR 523 at 529.

[92] In *R v City of Sault Ste Marie* [1978] 85 DLR (3d) 161 at 170.

[93] *Civil Aviation Dept v MacKenzie* [1983] NZLR 78 at 85.

[94] [1978] 85 DLR (3d) 161.

[95] [1986] 1 NZLR 660 at 666.

[96] *Civil Aviation Dept v MacKenzie* [1983] NZLR 78 at 85.

[97] *Sweet v Parsley* [1970] AC 132 at 150.

[98] *Millar v Ministry of Transport* [1986] 1 NZLR 660 at 668.

[99] *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 at 462.

[100] [1985] 1 AC 1.

[101] At 15.

[102] [1995] 1 HKC 21.

[103] Contrary to various provisions of the Dutiable Commodities Ordinance, Cap 109.

[104] Section I.

[105] At 38.

[106] At 33.

[107] At 35.

[108] Cap 383.

[109] At 38.

[110] (1996) 6 HKPLR 458 at 463-464.

[111] Litton, Ching and Bokhary PJJ. The other members of the Court were Li CJ and Lord Nicholls of Birkenhead NPJ.

[112] (1999) 2 HKCFAR 214.

[113] Cap 106.

[114] At 227.

[115] [2009] 3 HKLRD 299.

[116] (Unreported) HCMA 815/2002 (9 January 2003).

[117] Cap 59I.

[118] At §13.

[119] At §§17 and 18.

[120] At §19.

[121] At §20.

[122] [2009] 3 HKLRD 299.

[123] Cap 59.

[124] By section 18 of the Ordinance, certain defences were available in relation to "a duty or requirement to do something so far as is necessary, where practicable, so far as is reasonably practicable, or so far as practicable or to take all reasonable steps, all practicable steps, adequate steps or all reasonably practicable steps to do something..."

[125] At §§91 and 95.

[126] (1996) 6 HKPLR 458.

[127] (1999) 2 HKCFAR 214.

[128] [2009] 3 HKLRD 299 at 311 (italics supplied).

[129] At §107.

[130] At §115.

[131] At §103.

[132] At §131.

[133] At §137.

[134] At §12.

[135] (Unreported) HCMA 815/2002 (9 January 2003).

[136] [2009] 3 HKLRD 299.

[137] *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] 1 AC 1 at 14.

[138] [1969] 2 AC 256.

[139] [1984-1985] 157 CLR 523 at 528.

[140] *He Kaw Teh v The Queen* [1984-1985] 157 CLR 523 at 535.

[141] *R v Warner* [1969] 2 AC 256 at 271.

[142] *Sweet v Parsley* [1970] AC 132 at 163.

[143] *Sherras v de Rutzen* [1895] 1 QB 918 at 922.

[144] (1889) 23 QBD 168 at 177.

[145] [1969] 2 AC 256 at 271-272.

[146] [1963] AC 160.

[147] [1963] AC 160 at 174.

[148] *Sweet v Parsley* [1970] AC 132 at 163; *He Kaw Teh v The Queen* [1984-1985] 157 CLR 523 at 530, 567 and 595; *Millar v Ministry of Transport* [1986] 1 NZLR 660 at 667.

[149] [1985] 1 AC 1 at 13.

[150] (2006) 9 HKCFAR 530 at 543, §39.

[151] [1984-1985] 157 CLR 523 at 567.

[152] *Reynolds v Austin & Sons Limited* [1951] 2 KB 135 at 149.

[153] Appearing with Mr Douglas Jones for the appellants.

[154] Appearing with Ms Vinci Lam for the Respondent.

[155] Cap 227.

[156] [1968] 2 All ER 259.

[157] Section A.

[158] Eg, *HKSAR v Leighton Contractors (Asia) Ltd* [2000] 1 HKLRD 787 at 793.

[159] Section 71(5).

[160] Section 71(2).

[161] Section 71(1)(a).

[162] P-27.

[163] [2009] 3 HKLRD 299.