

## Extract from “The Justification of Strict Liability Offences”

**D.4** A core argument in favour of the use of strict liability offences is that it improves deterrence, and this would be weakened if, in addition to proving the facts of the offence, the prosecution had to prove there was intention or recklessness or some other element of fault to secure a conviction. This is likely to be especially important where the non-compliance involves technical and managerial complexities of which only the regulated body, rather than the regulator, has full knowledge.

**D.5** Prosecutions of legitimate businesses should generally be a matter of last resort after other sanctioning tools have failed or where the offence is serious enough to warrant a prosecution in the first instance. However, without the existence of criminal offences which are reasonably easy to prove, the regulator's power to advise and warn regulated businesses would be seriously jeopardized: “*Routine enforcement is conducted against a background of the criminal law and the implicit threat of its invocation. The fewer the uncertainties which attach to the law, therefore, the stronger is the agency's bargaining power.*”<sup>2</sup>

**D.6** Strict liability offences are also an important tool in securing convictions of corporate entities as well as individuals. Where an offence does not require proof of intention or recklessness, a company can, for example, be convicted where one of its employees carry out the act concerned during the course of their employment. In contrast, where a mental element is an ingredient of the offence, securing the conviction of the company will, under current principles, generally require the prosecution to prove that a senior officer in the company – someone who can be ‘identified as the embodiment of the company’ has the requisite mens rea.<sup>3</sup> This approach has been criticised as failing to reflect the contemporary reality of corporate decision-making, and indeed there are recent cases suggesting the UK courts are seeking to shift from such a rigid approach.<sup>4</sup> It is beyond the scope of this review to suggest changes in fundamental legal principles concerning corporate liability and it would be inappropriate for us to seek to do so. Nevertheless, it is important to acknowledge that any substantial move away from strict liability offences towards those requiring some element of mens rea is likely to require a reappraisal of current principles of securing convictions of companies as well as individuals.

**D.7** Strict liability for regulatory offences can also be justified on the grounds that business operating in regulatory areas can be said to implicitly accept the risk of criminal liability, even where no intention or recklessness is involved: “*He must take the risk and when it is found that the statutory prohibition or requirement has been infringed he must pay the penalty.*”<sup>5</sup> Strict liability encourages companies not just to do what they can reasonably be capable of, but to do everything possible to comply. Further, it may be consistent with a public view that regulatory breaches causing serious damage (such as a major pollution incident, or death or serious injury in the workplace or elsewhere) are truly criminal in their own right, whatever the state of mind of the perpetrator.

**D.8** Finally, in practice, any perceived injustices from strict criminal liability is tempered by the fact that “*fault creeps back in during the various stages of the enforcement process.*”<sup>6</sup> Prosecuting bodies have discretion whether or not to prosecute in a particular case, and are more likely to prosecute where in their view there is some element of fault. Courts have discretion in the sentence they impose, and lack of intention or recklessness can be presented by the offender in mitigation. Some regulatory offences also provide for due diligence defences, an issue considered further below.

<sup>2</sup> *Strict Liability for Regulatory Crime: The Empirical Research*, Richardson, G., in *Criminal Law Review*, 295, 1987.

<sup>3</sup> *R v HM Coroner for East Kent ex parte Spooner & others* [1989] 88 Cr App R 10.

<sup>4</sup> See, for example, *Rethinking Corporate Crime*, Gobert J. & Punch, M., 2003.

Lord Reid in *Warner v Metropolitan Police Commissioner* [1969] 2AC 256.

<sup>6</sup> *Regulating Pollution: A UK and EC Perspective*, Hilson, C., 2000.

<sup>7</sup> 1895] 1 QB 918.

<sup>8</sup> *Excuses, Excuses: the ritual trivialisation of environmental prosecutions*, de Prez, P., in *Journal of Environmental Law*,

Vol. 12(1):65-78, 2000; in the field of consumer law see *Mistakes, Accidents and Someone Else's Fault*, Croall,

H., in *Journal of Law and Society*, 293, 1988.