CRIMINAL RESPONSIBILITY UNDER THE MALAYSIAN PENAL CODE

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Thesis submitted in accordance with the requirements of the University of Edinburgh for the degree of Doctor of Philosophy

December 1996
I certify that this Thesis consists solely of my own original work, and that all the sources upon which I draw have been identified.
I am considerably indebted to my supervisors Dr. R.A.A. McCall Smith and Professor Robert Black for their generous assistance and encouragement during the writing of this thesis. They have painstakingly read through the draft and offered much advice and guidance. Their criticism and suggestions at each stage have been of considerable help in clarifying the development of the argument. The responsibility, however, for the accuracy and contents of the thesis remains mine.

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ABSTRACT OF THESIS (Regulation 3.5.10)

Name of Candidate: Mohd Baharudin Harun
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This study examines the criminal responsibility under the Malaysian Penal Code. The first chapter traces the historical background of Malaysia and of the Code.

The legal treatment of the issue of criminal responsibility begins in Chapter Two with the discussion of actus reus and mens rea which are the two basic components of criminal liability. A comparative approach has been adopted in the treatment of the subject. Thus, comparison of the position under the Common law and under the Penal Code as regards criminal responsibility continues to be the theme throughout this study.

Chapter Three examines a particular kind of liability i.e. strict liability. The meaning, historical background, rationale and development of strict liability offences are dealt with here.

In Chapter Four, this study turns to consider the defences to strict liability offences namely act related defences, defences based on lack of negligence and fault and defences provided by the statutes.

The study concludes in Chapter Five by considering the issue of mistake and ignorance of law. The newly emerging defence of officially induced error is also examined here.
Introduction.

This is a study of the criminal responsibility under the Malaysian Penal Code. The first chapter introduces a brief historical background of Malaysia and the history of its Penal Code, which is modelled on the Indian Penal Code (Act XLV of 1860). An appreciation of the origin of the Malaysian Penal Code helps to explain why reference has been made to Indian and African cases besides discussion of the leading English cases in the later chapters.

The second chapter begins with an overview examination of the basic elements of criminal liability. Discussion of actus reus and specific mens rea terms under the Penal Code was felt necessary to better comprehend the development of law in this area. A comparative approach has been adopted in the treatment of the subject. Naturally, emphasis is placed on the law of Malaysia, but analogies are drawn, whenever necessary, with other legal systems. Since the problems which are investigated in the Malaysian context, have often arisen in a similar form in other jurisdictions, an assessment of the solutions which have been evolved elsewhere is useful. A comparative study of the material, therefore, has a special justification in a work of this nature.
The third chapter deals with a specific kind of liability i.e. strict liability. Besides looking into the meaning, historical background, rationale and development of strict liability offences, the question of whether there is room for the reception of strict liability under the clear provision of the Malaysian Penal Code is examined. It appears that under the Penal Code, an offence of strict liability cannot be created except by express exclusion of the application of Chapter IV of the Code which contains the defences based on the absence of mens rea to the offence. However, judges in Malaysia have effectively removed strict liability offences from the control of the principles of the Penal Code and created an autonomous category of offences. As a result there exist in Malaysia a two track system, one consisting of the Penal Code and other statutes, the other consisting of statutory offences regarded by the court as constituting strict liability.

Chapter 4 consists of a discussion of the defences available to strict liability offences namely, act related defences, defences based on lack of negligence and fault and defences provided by statutes. There is also a discussion of the arguments for strict liability offences and a critical analysis of such arguments.
The fifth chapter focusses on the problem of mistake of law and ignorance of law. The newly emerging defence of officially induced error, which has yet to be recognised by the law of Malaysia is also highlighted in this final chapter.

There is no concluding chapter because it was not thought necessary to provide one since all the five chapters show that Malaysian criminal law is now at a cross-roads, whether to stand strictly by the provisions of the Code, or whether to follow the English common law and principles or whether to accept that the wide drafting of the Code allows incorporation of such law and principles. In fact, as far as Criminal Procedure is concerned, besides the local statutes, the Criminal Procedure Code allows reference to be made to English law wherever there is a lacuna. Section 5 of the Malaysian Criminal Procedure Code was amended in 1976 allowing references to the law in force in England, necessarily the common law as well as statutes.

Indeed, in drafting the Penal Code, the Indian Commissioners frequently reflected the general approach and policy of English criminal law, sometimes appropriately modified and reoriented. Thus, by analogy to Section 5 of the Criminal Procedure Code, since there is neither express abrogation nor an express retention of the rules of English criminal law,
reference can still be made and such reliance on common law principles is quite acceptable. Hence, while affirming that contemporary general principles of criminal liability are essentially contained in the Malaysian Penal Code itself, yet English common law and principles may still be relevant to “fill in the gaps”. Unlike it used to be, Malaysian law students are now able to receive their legal education within the country. As a result, our future lawyers and judges may find the provisions of the Code to be adequate without much reference to the English law.

This study was originally intended to be confined to “Strict Liability” and a critique thereof; but then it was thought necessary to provide some account of other responsibility concepts in order that Strict Liability might properly be understood.
CHAPTER 1: INTRODUCTION.

A. Historical sketch of Malaysia.

The primary source of substantive criminal law of Malaysia is contained in a variety of statutes, chief of which is the Penal Code.[1] This is a comprehensive statute modelled on the Indian Penal Code[2] and serves as the main repository of the substantive criminal law of Malaysia. Other principal and subsidiary sources are to be found in legislative enactments passed from time to time by the Parliament. The procedural or adjectival law is contained in the Criminal Procedure Code [2a] which supplements the former by rules of procedure.

A historical sketch is necessary in order to understand the history of the Penal Code. Penang and Malacca were at one time part of the "Straits Settlements" together with Singapore and a few other territories. On 16 September 1963 Singapore merged with the then Federation of Malaya, the Borneo States (now Sabah and Sarawak) to form the Federation of Malaysia. However, on 9th August 1965 Singapore separated from Malaysia and became an independent Republic.
B. History of the Penal Codes of Malaysia and Singapore.

The precursor of the Penal Codes of Malaysia and Singapore is the Penal Code of the Straits Settlements which was passed by the Legislative Council of the Straits Settlements in 1871 and came into force on 16 September 1872. It was modelled on the Indian Penal Code, Act No. XLV of 1860.

The Straits Settlements Penal Code was applied to the Settlements of Singapore, Penang, Malacca and Labuan. The Straits Settlements Penal Code was then adopted by the four Federated Malay States of Perak, Selangor, Negeri Sembilan and Pahang, and the non-Federated Malay States of Johore, Kelantan and Trengganu by individual Enactments as follows:

<table>
<thead>
<tr>
<th>State</th>
<th>Adoption Enactment No.</th>
<th>Date of coming into force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perak</td>
<td>8 of 1909</td>
<td>11.6.1909</td>
</tr>
<tr>
<td>Selangor</td>
<td>18 of 1905</td>
<td>1.1.1906</td>
</tr>
<tr>
<td>Negeri Sembilan</td>
<td>18 of 1905</td>
<td>1.1.1906</td>
</tr>
<tr>
<td>Pahang</td>
<td>12 of 1909</td>
<td>1.6.1909</td>
</tr>
<tr>
<td>Johore</td>
<td>17 of 1920</td>
<td>18.10.1920</td>
</tr>
</tbody>
</table>
Kedah enacted the Penal Code as Enactment No 13 of 1945 which was then adopted by Perlis by Enactment No. 13 of 1954.

When Singapore became a Crown Colony in 1946 the Penal Code became the Penal Code of Singapore while the Straits Settlements Penal Code continued to apply to Penang and Malacca until 1948.

In 1935 the Federated Malay States Penal Code (FMS Cap 45) came into existence and applied to the Federated Malay States, and the individual Penal Code enactment of each of these states was repealed. In 1948 when the Federation of Malaya was formed, it was considered desirable that the law relating to criminal offences should be unified, amended where necessary and extended to apply throughout the Federation of Malaya. By the F.M.Ordinance No. 32 of 1948 (which came into force on 18.12.1948), F.M.S.Penal Code Cap. 45 was applied throughout the Federation. The individual enactments of the then unfederated Malay States and also the Straits Settlements Penal Code were repealed.
Subsequently, the Federated Malay States Penal Code was extended throughout Malaysia by the Penal Code (Amendment and Extension) Act 1976 (Act A327). This came into force on 31st March 1976. As the Federated Malay States Penal Code was already applicable to the States of Malaya, the Act was effectively extended to Sabah and Sarawak only, and therefore repealed the Penal Codes of these two states. Though the F.M.S. Penal Code and the Singapore Penal Code have both been amended from time to time, they still retain their main original provisions.

C. F.M.S. Penal Code Cap.45.

Being a Code, it would seem obvious that it is intended to deal exhaustively with all the offences and defences contained in it. The long title of the Penal Code of Malaysia states that it is "An Enactment to consolidate the law relating to criminal offences". Thus, for
example, the F.M.S. Penal Code deals with the following matters, unless otherwise indicated:

Chapter I (ss 1-5) Preliminary
Chapter II (ss 6-52) General Explanations
Chapter III (ss 53-75) Punishments
Chapter IV (ss 76-106) General Exceptions
Chapter V (ss 107-120) Abetment
Chapter VA (ss 120A-120B) Criminal Conspiracy
Chapter VI (ss 121-130A) Offences Against the State
Chapter VII (ss 131-140B) Offences Relating To The Armed Forces
Chapter VIIIA (ss 141-160) Offences Against The Public Tranquility
Chapter IX (ss 161-171) Offences By Or Relating To Public Servants
Chapter X (ss 172-190) Contempts Of The Lawful Authority Of Public Servants
Chapter XI (ss 191-229) False Evidence And Offences Against Public Justice
Chapter XII (ss 230-263) Offences Relating To Coin And Government Stamps
Chapter XIII (ss 264-267) Offences Relating To Weights And Measures
Chapter XIV (ss 268-294) Offences Relating To Public Health, Safety, Convenience, Decency, And Morals
Chapter XV (ss 295-298) Offences Relating To Religion
Chapter XVI (ss 299-377A) Offences Affecting The Human Body
Chapter XVII (ss 378-462) Offences Against Property
Chapter XVIII (ss 463-489D) Offences Relating To Documents And To Currency Notes And Bank Notes
Chapter XIX (ss 490-492) Criminal Breach Of Contracts Of Service
Chapter XX (ss 493-498) Offences Relating To Marriage
Chapter XXI (ss 499-502) Defamation
Chapter XXII (ss 503-510) Criminal Intimidation, Insult and Annoyance
Chapter XXIII (ss 511) Attempts To Commit Offences

The Malaysian Penal Code was modelled on the Indian Penal Code and was first drafted by the Indian Law Commission of which Lord Macaulay was President. John Clive, writing on Lord Macaulay's work on the Indian Penal Code said:

"The idea of drawing up a complete criminal code for India was Macaulay's. The Charter Act of 1833 had conceived of the inquiries undertaken by the law commissioners as preliminary to whatever alternatives of the law might be judged necessary......
Reform of the English criminal law had indeed engaged the attention of leading statesmen - Mackintosh, Romilly, Peel and Brougham among others."[3]

Clive also pointed out that English criminal law was still in a state of chaos, with serious reforms just being put in train. And it was no doubt because it was still both "undefined" and "loose" that Macaulay suggested to the Council that its instruction to the law commissioners should emphasize that the Indian Code was to cover all contingencies. "Not only ought everything in the code to be law; but nothing that is not in the code ought to be law." The code was to be more than a mere digest of existing usages and regulations, and thus comprise all the reforms that the Law Commission might think desirable.....

The terminology to be employed in the proposed code was to be clear and unequivocal, the language concise and perspicuous. The Council [ie The Governor-General of India in Council] was to warn the commissioners against using vague terms such as "treason" or "manslaughter", taken from English law - "words which include a great variety of offences widely differing from each other...."[4]

Despite a cutting of the English umbilical cord in many areas of criminal law dealt with in the Indian Penal
Code, English Law had somehow got connected in its interpretation not only in India but also in those jurisdictions which derive their Penal Codes from the Indian subcontinent, including Malaysia.

In drafting the Indian Penal Code, the Commission drew their inspiration not only from the English and Indian laws and regulations, but also the Penal Code of France and Livingston's Code for Louisiana. Although the criminal laws of France and Louisiana have hardly, if ever, been resorted to in the interpretation of the local or Indian Penal Codes, English criminal law has been relied upon not only in the interpretation of the Penal Codes but also in the face of express provisions. Speaking on the Indian Penal Code, Balasubrahmanyam bemoans that "it is a tragedy that sometimes the Indian Penal Code is called to bear the oppressive weight of English case law."[5] Courts in Malaysia and Singapore have also at times unjustifiably looked to English case law either in the interpretation of the Penal Codes or in utter disregard of express provisions contained in them or in other criminal statutes. For example, in the recent case of Public Prosecutor v. Zainal Abidin bin Ismail[6], the High Court of Brunei ignored the provisions of sections 79 and 375 of the Penal Code of Brunei.[7] After making reference to these two sections, Dato Sir Denys Roberts applied the English case of Morgan[8]
A few months later when a similar issue was raised in the Singapore case of Teo Eng Chan [9], P. Coomaraswamy J. rightly rejected the approach in Zainal Abidin and decided the case according to the law on mistake under section 79 of the Penal Code of Singapore.

Teo Eng Chan is clearly a judgement to be welcomed for it actually takes cognisance of the Penal Code. However, on what basis did Coomaraswamy J. feel free to disregard the leading precedent in Singapore binding on him? The Privy Council in the case of Lim Chin Aik v. The Queen [9a] has decided that when a statute is silent as to whether mens rea is required, it is to be presumed. Lim Chin Aik did not suggest that this presumption is to operate "via the back door" in that section 79 is applicable, but rather mens rea is positively presumed and the burden of proving it is still on the prosecution. [9b]

In the interpretation of section 300 Exception 1 of the Penal Code (i.e. defence of provocation) the former Court of Appeal in Malaya in the case of Mat Sawi bin Bahodin[10] cited with approval a passage from the English case of Holmes[11] in which the test of provocation under English law was measured by the
reasonable man. This is in the face of the absence of the mention of "reasonable man" in the section. Although the Penal Code is not a codification of English criminal law, this does not mean that the principles and concepts of English criminal law are not relevant at all. They are relevant and of persuasive authority in the construction of the Penal Code and other criminal law statutes, provided they are not inconsistent. There are, for example, a number of concepts in the Penal Code that are not defined or are defined inadequately and thus resort may be had to those concepts as they have developed in England or in other jurisdictions. Examples are "cause", "act" and "intention" to mention a few. What is more important in the construction of the Penal Code are cases on the Indian Penal Code and the other Penal Codes which are derived from the Indian Penal Code, such as the Penal Code of Sri Lanka and those of some African countries. The cases from these jurisdictions are more relevant and are of highly persuasive authority compared to the English cases.

The existing state of affair is however understandable for the vast majority of judges presiding in Malaysia and Singapore have had their legal education in England and are more familiar with the English criminal law rather than the criminal law of Malaysia and Singapore. With more lawyers being now locally qualified[12], there
should be more awareness of the need to appreciate the similarities and differences in the criminal law of Malaysia and Singapore on the one hand and England on the other.

D. Doctrine of *stare decisis* in criminal cases in Malaysia.

A word on the doctrine of *stare decisis* or binding precedent, as it applies in criminal cases in Malaysia is necessary.

The English doctrine of *stare decisis* generally forms part of the judicial system in Malaysia. According to the doctrine, decisions of the highest court in a judicial system bind all courts lower in the hierarchy. Appellate courts bind themselves and the lower courts. High courts do not bind themselves but they bind the lower courts. Finally, the lower courts do not bind themselves.

Malaysia abolished appeals to the Judicial Committee of the Privy Council on 1st. January 1985.[13] With this in mind, the following is a summary of the doctrine of *stare decisis* as it applies in criminal cases in Malaysia:
1. Decisions of the Privy Council on appeal from Malaysia before 1st. January 1985 are binding on all Malaysian courts.

2. "Applicable" decisions (i.e. where the law is in pari materia) of the Privy Council in appeals from other jurisdictions before 1st. January 1985 are binding on all Malaysian courts.

3. Decisions of the Supreme Court in criminal matters are binding on itself, the High Court of Malaya and the High Court of Borneo and all subordinate courts in Malaysia.

4. Decisions of the High Court are not binding on itself but bind the subordinate courts.

5. Decisions of subordinate courts are not binding on themselves.
NOTES

1. F.M.S. Cap 45.

2. Act No. XLV of 1860.

2a. F.M.S. Cap 6


4. Ibid.


7. The Penal Code of Brunei is in pari materia with the Penal Codes of Malaysia and Singapore.


9b. see infra. Chap 2, pp. 126 - 142


12. The Law Faculty in the National University of Singapore produced its first batch of graduates in 1961 and the University of Malaya, in 1976. There have been three other law schools set up in Malaysia since.

13. Constitution (Amendment) Act 1983 (Act A566) s. 17, brought into force by PU(B) 589/84.
CHAPTER 2: BASIC ELEMENTS OF CRIMINAL LIABILITY.

A. Introduction

Every crime has its own definition. For instance, the definition of murder in section 300 is, naturally, quite different from that of rape in section 375 of the Penal Code[1]. Nevertheless, most crimes do possess broadly similar characteristics or are subject to common exceptions, which can loosely be described as the basic elements or general principles of criminal liability.

Generally speaking, most legal systems adopt the position that criminal liability is only justifiable if a person commits a prohibited act or causes a forbidden harm and his actions are accompanied by a blameworthy state of mind. This is often stated in the form of the latin maxim: actus non facit reum nisi mens sit rea (an act does not make a person legally guilty unless his mind is legally blameworthy). According to Smith and Hogan, "a person may not be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (a)
that he has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs. The event, or state of affairs, is called the actus reus and the state of mind the mens rea of the crime."[2] From this it can be deduced that as a general rule criminal liability is only imposed if there is a coincidence of the following two ingredients:

1. Actus reus which is the conduct or action of the accused which produces or constitutes the forbidden harm, for instance, firing a gun and killing the victim; and

2. mens rea: a blameworthy state of mind, for instance, intending to kill when firing the gun.

The terms actus reus and mens rea are no more than tools that are useful in the exposition of the criminal law.

B. Actus Reus.

Before imposing criminal liability there must be conduct. The accused must have done something. The criminal law
does not engage in punishing thought crime. No matter how wicked one's intentions, the law insists upon a physical manifestation of those evil intentions before it will intervene. The Penal Code, however, does contain one dramatic exception to this rule.

Section 121 A Penal Code reads:

"Whoever compasses, imagines, invents, devises or intends the death or hurt to or imprisonment or restraint of the Yang diPertuan Agong or any of the rulers or Governors, their heirs or successors, shall be punished with death and shall also be liable to fine."

How could simply imagining the death of the Yang di Pertuan Agong ever be proved? By way of comparison, under the English Treason Act of 1351, it is also a form of treason to be "compassing or imagining" the death of the King. Is it also a crime to imagine the death of the King? It appears that the statute should not be understood as such. The courts have required an overt act manifesting the intention, and this act must be something more than a confession of the intention. It must be an act intended to further the intention; perhaps too, it must actually do so. [2a]
The actus reus represents the physical effect of human conduct prohibited by law.[3] Thus, "it is important to note that the actus reus, which is the result of conduct, and therefore an event, must be distinguished from the conduct which produced the result. For example, in a simple case of murder it is the victim's death (brought about by the conduct of the murderer) which is the actus reus; the mens rea is the murderer's intention to cause that death. In other words, the crime is constituted by the event, and not by the activity which caused the event."[4] The harm caused by the conduct which brings about the actus reus is considered injurious to society in a sufficiently high degree to warrant invocation of penal sanctions. According to Turner, the actus reus involves three elements:

(a) human action or abstention from action;
(b) such circumstances as are specified by law;
(c) the result of this conduct in these specified circumstances.[5]

Williams on the other hand lays down the following requirements:
(a) A willed movement (or omission)
(b) certain surrounding circumstances;
(c) certain consequences.[6]
Since the criminal law of Malaysia is wholly statutory, the actus reus is part of the statutory definition of an offence in the law. To take an example, the definition of assault under the Malaysian Penal Code is as follows:

"Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault."[7]

Thus, the required conduct consists of the making of a gesture, an act of preparation or the uttering of words in the circumstances envisaged by the explanation attached to the definition of the offence.[8] But these types of conduct, in themselves, are not sufficient. The gesture, the threat or the preparatory act, in its relation to the surrounding circumstances, must entail the likelihood that some person present would apprehend the imminent application of criminal force. The accused's conduct, then, is held in this instance to contain an element which is an integral part of the conception of the actus reus, only if certain attendant circumstances, for example, the presence of other persons, are established. Finally, the effect or
consequence required in the example taken to complete the actus reus, is the inducement, in the victim's mind, of the expectation that criminal force is about to be used.

The actus reus generally connotes not an act itself but the result of an act. However, the effect prohibited by the law is separable in sequence from the conduct, in some offences but not in others. Murder[^9] is an example of the former category, while the giving of false evidence[^10] is an instance of the latter. The actus reus of murder relates to a consequence or result, namely, the death of a human being, and not to the preceding conduct which brings about this result. Thus, the actus reus of murder is the same, whatever may be the means employed by the accused to cause this effect, whether by shooting, stabbing, striking, administering poison or by some other act. Although these acts are committed, the actus reus of murder would not be established unless death results from them.

On the other hand, the actus reus of the offence of giving false evidence is committed directly a false statement is made in the relevant circumstances, regardless of the effect of the statement.
Thus there are broadly two types of crime:

1. Result or consequence crimes where the definition of the crime requires the conduct of the accused to cause a prohibited result or consequence. For instance, for murder, as defined in section 300 of the Penal Code, the act of the accused must cause death. The causing of the prohibited result is the critical element in the offence.

2. Conduct crimes where criminal liability is imposed simply because the accused has done something that is prohibited by law. These actions need have no result as in the example of giving false evidence under section 191 of the Penal Code.

The majority of offences in the law belongs to the first category, since it is the effect of an act, rather than the act itself, that is made criminal. But exceptionally, the act itself, irrespective of its consequences, may be treated as criminal.

Thus, the main distinction between conduct crimes and result crimes is that with the latter, it must be established that the conduct of the accused caused a particular, prohibited result.
Apart from this distinction relating to causation, the common element in the definition of crimes is that there be some act or conduct on the part of the accused. However what is meant by an "act" or "conduct"? No comprehensive definition is provided in the Penal Code. The only sections of any relevance here are sections 32 and 33.

Section 32:
"In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions."

Section 33:
"The word act denotes as well a series of acts as a single act: the word omission denotes as well a series of omissions as a single omission."

According to Gour,[11] the word "act".....must be construed in the light of commonsense..... "Act" is nowhere defined. It must necessarily be something short of a transaction which is composed of a series of acts, but cannot, in ordinary language be restricted to every separate willed movement of a human being; for when courts speak of an act of shooting or stabbing, it means
the action taken as a whole and not the numerous movements involved. Where an accused has done more than one act, each following closely upon, and being intimately connected with each other, they are not to be separated and assigned the one to one intention and the other or others to another intention.

According to McCall Smith[12], "Acts do not take place in isolation. What X does at ten o'clock may only make sense if we know what he did at nine. Then, some acts are preparatory to others. Lifting a telephone receiver and placing a finger in the dial is not the complete act of making a telephone call. How we describe acts may also be important. We can say of Dr. Bodkin Adams that in administering large doses of morphine to his patients he was killing them; but he would and did, say that he was merely deadening pain. Here, as in other areas, language is a malleable tool, and the way in which one describes an event or series of events may depend to a great extent on what end one wants to achieve." A brief look at some of the decided cases will illustrate the difficulty where a series of acts is involved.

In the case of Thabo Meli v. R.[13], the appellants in accordance with a pre-arranged plan, took a man to a hut,
and gave him beer so that he was partially intoxicated. They then struck him over the head with intent to kill and thereafter thinking him to be dead and in the hope of escaping detection, they rolled the body over a cliff so that it might appear to be a case of an accident. Medical evidence indicated that the appellants had not succeeded in killing the deceased in the hut but that he had died from exposure when he was left unconscious at the foot of the cliff.

On behalf of the appellants it was argued that their first act, namely the attack in the hut, was accompanied by mens rea but it did not cause the death and the second act, namely, throwing the body down the cliff which caused the death was not accompanied by mens rea. Therefore they should not be held guilty of murder. This submission was however rejected by the Privy Council and their Lordships observed:

"It appears impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as part of their plan; and it is much too refined a ground of judgement to say that, because they were under a misapprehension at one stage and thought their guilty purpose had been achieved before, in fact,
had it was achieved, therefore they are to escape the penalties of the law."

This decision of the Privy Council has been severely criticised by English judges and jurists. Russell thinks that the observations are no more than obiter dicta and open to review in the light of further argument.[14]

In Chiswibo[15], the accused was convicted of attempted murder in the High Court of Southern Rhodesia. The accused hit the deceased on the head with the blunt side of an axe. Thereafter, genuinely and reasonably believing that the deceased was dead, he put the body down an ant-bear hole. The blow might not itself have been fatal, and death may have been caused by the subsequent internment in the hole. At the time when the accused struck the deceased, he did not intend to kill.

Clayden C.J., delivering the judgement of the Supreme Court of the Federation of Rhodesia and Nyasaland, held that the ruling of the Privy Council in Thabo Meli was distinguishable on the facts of that case. There a plan to kill was established, and the plan included the act which caused death. On the other hand, in Chiswibo,
there was no intention to kill, but the prosecution urged
that the murderous intention could be constructively
imputed on the basis that there was appreciation of the
risk to life in what the accused did, coupled with
recklessness as to whether or not that risk was fulfilled
in death. Clayden C.J., rejecting this premise, said:

"The proof of intent is necessarily bound up with what is
done, for the appreciation is of risk in doing that act.
The test is subjective. A person who is found to have
believed that it was a dead body with which he was
dealing, cannot also be found to have appreciated that
there was a risk to life in what he did." Accordingly,
it was held that application of the principle enunciated
in *Thabo Meli* to the facts of *Chiswibo*, would involve an
unwarranted extension of that principle.

The Southern Rhodesian case of *Shorty*\(^{[16]}\) falls on the
same side of the line as *Chiswibo*. In this case, the
first accused had violently assaulted the deceased.
Believing him to be dead, the first accused and two other
accused persons disposed of the body by putting him down
a sewer, where he died of drowning.

It was held that the first accused was guilty of
attempted murder only, and the other two accused were
dealt with as accessories after the fact to attempted murder. This decision, again, turned on the fact that the blow was not struck with intent to kill.

The object of the doctrine of concurrence of act and intent in criminal law is to ensure that the consequence which is characterised as penal, emerges from the accused's act, committed with the appropriate mental requisite, and not from a circumstance in regard to which responsibility is not imputable to him. As Jerome Hall observes: "The principle of concurrence requires that the mens rea (the internal fusion of thought and effort) coalesce with the additional manifested effort (act), that they function externally as a unit to comprise criminal conduct."[17] In other words, even though the accused desired the criminal objective and committed some overt act towards its attainment, liability for the ultimate effect, which is in fact caused, would not be attributed to him if the causal nexus between the accused's conduct and the ensuing of the criminal consequence is ruptured by an independent act which is not typified by the required mens rea.

In the case of R. v. Church[18] the appellant Church, whose van was standing near the bank of a river, had an
altercation with a woman in the van and in the course of the ensuing fight knocked her unconscious. He thereafter threw the woman into the river. At the trial for murder, Church deposed that, when he threw the woman into the river, he believed her to be already dead. Medical evidence, however, established that the woman was still alive when she entered the river and that, although she bore marks of grave injuries which were likely to cause unconsciousness and ultimate death, the actual cause of her death was drowning. Church's appeal against conviction of manslaughter was dismissed.

The question whether the effect produced was premeditated or known to be probable by the author is, therefore, always a question of fact to be determined according to the particular circumstances of each case, but, whatever the facts, the prosecution has to prove them with sufficient clearness so as to establish a causal relationship between the doer and the deed.

In Thabo Meli and Church the courts have shown themselves unwilling to split up the different acts which are regarded as comprising a single transaction, and these conclusions are in accord with common sense notions of justice. Glanville Williams states: "In these cases the
accused intends to kill and does kill; his mistake is only as to the precise moment of death and as to the precise act that effects death."[19] It is pointed out in a note on Thabo Meli's case in the Law Quarterly Review that it involves a fallacy to argue, as was impliedly done by the defence in Thabo Meli, that death must be due to a single dominant cause.[20] Although the exposure was one cause of the deceased's death, nevertheless the blows which he had received were another cause, although more remote in time, and there can be no doubt that these blows were both intended to be given and were intended to cause his death.[21]

In Malaysia, this approach would derive direct support from section 33 of the Penal Code[22] which declares that the word "act" denotes a series of acts as well as a single act.

In considering the meaning of an "act" or "conduct" it is, however, necessary to consider two important issues, namely, the requirement that the conduct of the accused be voluntary and second, the fact that an "act" may be broadly interpreted to include certain omissions to act.
1. **Conduct must be voluntary.**

The Penal Code does contain a definition of "voluntary" in section 39 which reads: "A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it." This however, refers to mens rea and is of not much assistance.

(a) **The Common Law approach.**

The very notion of an "act" or "conduct" connotes voluntary action or conduct. Holmes defined an "act" as a "willed muscular contraction." The mind is in control of bodily movements; it sends instructions to the muscles; an "act" is thus a physical movement resulting from an operation of the will. Edwards is of the view that "it is the fundamental requirement of all criminal liability, whether the offence is one of absolute prohibition or one involving proof of a guilty mind and whether statutory or common law in origin. This requirement stated in its simplest form, is that the "act" of the the accused, in the sense of a muscular movement, must be willed. It must be a voluntary expression of the accused's will."[23]
This breakdown of human behaviour into two elements i.e. the desire for the muscular movement and the movement itself has been severely criticised. Hart rightly points out that described in these terms it cannot apply to omissions. Furthermore such an analysis does not reflect the reality of our movements. According to him, "...a desire to contract our muscles is a very rare occurrence: there are no doubt some special occasions when it would be quite right to say that what we are doing is contracting our muscles, and that we have a desire to do this. An example of this is what we may do under instruction in a gymnasium. The instructor says "lift your right hand and contract the muscles of the upper arm." If we succeed in doing this (and it is not so easy) it would be quite appropriate to say we desired it and did contract our muscles....But when we shut a door, or when we hit someone, or when we fire a gun at a bird, these things are done without any previous thought of the muscular movements involved and without any desire to contract the muscles.....The simple but important truth is that when we deliberate and think about actions, we do so not in terms of muscular movements but in the ordinary terminology of actions."[24]

This view of action is now one which is largely replaced in modern accounts of human action, which stress that
what marks out action as voluntary is an awareness on the part of the actor that he is acting, along with an ability to prevent himself from acting should he so desire. If one has been pushed and is falling uncontrollably down a flight of stairs, it is a negation of common sense to assert that one is acting; one's physical movements are not under the circumstances an exercise of the will. It follows that criminal liability would be most inappropriate in such cases. This latter view would be preferred for purposes of this thesis.

In the case of Hill v. Baxter[25] the question before the Divisional Court was whether the accused had put forward sufficient evidence on a charge of dangerous driving to justify the justices adjudging that he should be acquitted, there having been no dispute that at the time when his car collided with another one he was at the steering wheel. At the trial the accused had contended that he became unconscious as a result of being overcome by an unidentified illness. The court allowed an appeal by the prosecution against the verdict of acquittal. Lord Goddard CJ has commented:

"I agree that there may be cases when the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic
fit, both instances of what may properly be called Act of God; he might well be in the driver's seat even with his hands on the wheel but in such state of unconsciousness that he could not be said to be driving....In this case, however, I am content to say that the evidence falls far short of what would justify a court holding that this man was in some automatous state."[26]

Where physical movements are involuntary but have caused a harm, punishment is undeserved and can serve no useful utilitarian purpose. Accordingly, most legal systems have exempted such persons from criminal liability. They have not "acted"; there is no actus reus. The common law has developed a term for such cases and they are afforded the defence of automatism. Automatism refers to a condition in which a person manifests complex behaviour in a state of clouded or residual consciousness.[27]

The real problem has been to define the concept of "voluntariness". Hart observes that "conduct" is "voluntary" or "the expression of an act of will" if the muscular contraction which, on the physical side, is the initiating element in what are loosely thought of as simple actions, is caused by a desire for the same contractions. This is all the mysterious element of the
"will" amounts to: it is this which is the minimum indispensable link between mind and body required for responsibility."[28] This basic requirement is not satisfied in cases of "automatic" conduct.

The example of someone being pushed down the stairs is however an "easy" one. There is no control at any level of will over physical movements. However, what of a person in a state of somnambulism?

Somnambulism, or sleepwalking, occurs during slow-wave sleep, when the body is capable of fairly complex movement. Somnambulistic violence is rare, but there is fairly general agreement among psychiatrists that it is quite possible for a sleeping person to commit assault or even homicide in a state of complete unconsciousness and to have no waking recollection of what has been done.[29] In such a case, there is clearly no voluntary act and therefore it could be argued that there can be no actus reus.[30]

In an old, but famous Scottish case of Simon Fraser,[31] the accused killed his baby son while in a state of somnambulism, thinking he was attacking a wild beast which had jumped onto his bed. There was evidence that
he was in the habit of getting up in his sleep and that he had in the past committed acts of violence in his somnambulistic states. Although there was no formal acquittal, he was held not responsible for the killing. In this case, the basis of the exception from liability is that the accused would not have known what he was doing. Fraser was certainly not treated as insane, but the court was clearly concerned with the question of preventing a recurrence of his behaviour. This was solved with Fraser undertaking to sleep alone in future.

In the Australian case of Cogdon,[32] Mrs. Cogdon, in a somnambulistic state, dreaming that her daughter was being attacked by ghosts, spiders and North Korean soldiers, axed her daughter to death. Is this involuntary "conduct"? The physical movements of a sleepwalker are controlled by some form of mental power, albeit subconscious. They are not the same as someone falling uncontrollably down a flight of stairs. In Cogdon's case the Supreme Court of Victoria allowed the complete acquittal of the somnambulistic mother.

In the Canadian case of R. v. Parks[33] the appellant claimed to have driven 23 kilometres while still asleep and killed his mother-in-law and seriously injured his
father-in-law, both of whom he had a good relationship with. The defence of automatism was pleaded by the appellant and the question was left to the jury with the direction that he would be entitled for an acquittal on the basis of non-insane automatism if he was found to be in a state of somnambulism at the time of the killing. Though the Ontario Court of Appeal found the case extremely troubling, the Crown's appeal against Park's acquittal was dismissed.

However a contrary decision was reached by the English Court of Appeal in *R. v. Burgess*.[34] The appellant in this case was charged with wounding with intent. He accepted that he had attacked his female friend, a neighbour who lived in the flat immediately above him by hitting her on the head with a bottle and the video recorder and finally grasped her round the throat. He called for an ambulance for the victim, who had been severely cut on the head, and then ran away from the scene. At his trial his defence was that he lacked the mens rea necessary to make him guilty of the offence because he was sleepwalking when he attacked the victim and was suffering from non-insane automatism. Medical evidence for the appellant was that his actions had occurred in a sleep disorder caused by an internal factor, ie an abnormality of brain function.
The Court held that violence whilst sleepwalking or "sleep associated automatism" was due to an internal factor and amounted to insanity within the McNaughten Rules and not merely non-insane automatism.

According to Irene Mackay, *Burgess* is "an important decision in that it illustrates once again the difficulties faced by the courts in applying the McNaughten Rules and in often reaching conclusions which give rise to the thoroughly unsatisfactory and unacceptable procedure of incarcerating the accused. It serves as a warning that non-insane automatism is rarely a successful defence and should be raised only where the cause of the automatic behaviour is an external factor such as a blow to the head causing concussion or when an anaesthetic has been administered."[35]

The difficulty confronted by the trial judge as well as the Court of Appeal in deciding the issue at hand was understandable since there was no direct English authority on violence while sleepwalking. They were however, not without assistance on this issue. Stephen J as long ago as 1889 said:[36]
"Can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing."

Lord Denning when emphasising that an act must be voluntary to constitute a criminal offence has also said:[37]

"No act is punishable if it is done involuntarily: and an involuntary act in this context - some people nowadays prefer to speak of it as automatism - means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion, or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleepwalking."

This basic principle of the criminal law that only voluntary acts will result in criminal liability clearly suggests that acquittal is appropriate if the accused has acted automatically. Somnambulistic acts provide a classic illustration of automatic behaviour where the actor is not conscious of his acts or where he has no
control over his acts. Thus the wisdom in deciding that Burgess' violent acts that had taken place while he was sleepwalking amounted to insanity under the McNaughten Rules and not non-insane automatism, even though the possibility of the recurrence of serious violence was unlikely, is questionable. It is felt that a need has not arisen for the court to pursue a social defence policy, since Burgess was not the sort of case where the accused should be detained in hospital in order to protect the public.

According to Mason and McCall Smith,[38] "Automatic behaviour can result from a variety of causes which may be organic and non organic. Organic automatism is the product of a bodily condition such as hypoglycaemia, epilepsy or concussion and other cerebrally significant conditions such as arteriosclerosis. Organic automatism may also be caused by the ingestion of alcohol or other drugs but offences committed while intoxicated are usually considered by the law to be a discrete problem and are dealt with in a different context from other types of automatism. The non-organic automatisms, which are more legally controversial, are usually the product of acute emotional stress which has, essentially, resulted in a state of disassociation."
The Common law has not attempted to face these complex problems and has instead simply used the requirement of voluntariness as a mechanism to exclude certain cases from its ambit. It has, in effect, "defined" voluntariness by example. Certain human conduct is simply perceived as too abnormal to be brought within the ambit of criminal law. Punishment in such cases is so pointless that the "conduct" can safely be regarded as "involuntary" and the accused afforded a defence of automatism. It is widely accepted that the following categories of involuntary conduct will give rise to a defence of automatism in English law:

1. Physical compulsion: for example, being pushed down a flight of stairs.

2. Reflex movement of an external origin: for example, reflexive movements while being attacked by a swarm of bees.


4. Unconsciousness: for example: movements while under the effect of general anaesthetic.
5. Hypnosis.


7. Hypoglycaemia: where a diabetic with a blood-sugar deficiency acts in an uncoordinated manner.

The account of “automatism” situations given is predicated on the view that Burgess is wrongly decided.

However, common law courts have exercised extreme caution in this regard. An accused found to be acting in a state of automatism is entitled to a complete acquittal. Accordingly, in drawing up the category of persons entitled to such a defence the courts have been careful only to include those who are safe to release in that they are unlikely to repeat their automatic behaviour. This means that two categories of involuntary conduct have not been included on such list:

(i) Involuntary conduct caused by disease of mind.

In the English House of Lords decision of Sullivan[39], the accused was suffering from an epileptic fit when he attacked a friend, and it was held that if the involuntary movements had an internal cause resulting in a mental impairment the accused should not be
acquitted on grounds of automatism but should instead receive the special insanity verdict which would result in indefinite detention "at Her Majesty's pleasure". It was indicated by the House of Lords that an acquittal on grounds of automatism should be reserved for those cases where the involuntary conduct was caused by "some external factor such as a blow on the head causing concussion or the administration of an anaesthetic for therapeutic purposes". In this way control can be maintained over persons thought dangerous. If they are suffering from a disease of the mind there is always the risk that they may repeat their anti social behaviour. Indefinite detention until they are "cured" is perceived as the best method of protecting society.

Smith and Hogan view this as something gravely wrong when an accused such as Sullivan," a person who, on evidence, is not guilty of an offence will plead guilty to it rather than submit to a verdict of not guilty on the ground of insanity. The propriety of accepting such a plea seems doubtful but it was not questioned by the Court of Appeal and the House of Lords left the matter open while affirming the appellant's conviction of a crime of which he was not guilty."[40]
(ii) Involuntary conduct caused by accused's own fault.

If an accused does something, such as taking drugs, or if he fails to do something, such as when a diabetic fails to eat after taking insulin, and he knows or ought to know that there is a risk of resultant involuntary conduct, the law will not allow him to hide behind the protective umbrella of the defence of automatism. He is to blame for bringing about the involuntary conduct; the criminal law is concerned with the punishment of the blameworthy who causes harm. This seemed to have been suggested by the Court of Appeal in the case of R. v. Quick and Paddison [41] even though in that case it quashed the conviction of the appellant for assault. The alleged assault had taken place whilst the appellant (a diabetic) had been in a state of hypoglycaemia (low blood sugar) which the trial judge had (wrongly in the view of the Court of Appeal) ruled amounted to insanity.

The appellants were nurses employed at a mental hospital. They were convicted of assault occasioning actual bodily harm to a paraplegic spastic patient at the hospital. Quick called medical evidence to show that he was diabetic and that at the time of the alleged assault he was suffering from hypoglycaemia and was unaware of what he was doing. He submitted that the evidence established a defence of automatism. Bridge J. ruled that the
defence raised was one of insanity, whereupon Quick changed his plea to guilty. Paddison was convicted by the jury on the basis that he had abetted Quick. Quick appealed on the ground that the judge's ruling was wrong and that a diabetic in a temporary and reversible condition of hypoglycaemia was not, while in that condition, suffering from any defect of reason from disease of the mind.

It was held on appeal that the alleged mental condition was caused not by the appellant's diabetes but by his use of insulin prescribed by the doctor. This was an external factor and the defence of automatism should have been left to the jury. If the condition had been caused by the diabetes then it would seem that the defence would have been insanity. The defence of non-insane automatism was thus never put to the jury, but Lawton LJ had the following to say about such a defence:

"A self-induced incapacity will not excuse....nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals while taking insulin...."
Had the defence of automatism been left to the jury, a number of questions of fact would have had to be answered....to what extent had he brought about his condition by not following his doctor's instructions about taking regular meals? Did he know that he was getting into a hypoglycaemic episode? If yes, why did he not use the antidote of eating a lump of sugar as he had been advised to do? On the evidence which was before the jury, Quick might have had difficulty in answering these questions in a manner which would have relieved him of responsibility for his act."[42]

It thus appeared after Quick that, even where automatism was not caught by the rules on insanity and intoxication, it was not available if it could be said to be self induced. Thus in the case of Bailey[43], a similar defence based on automatism caused by hypoglycaemia was held by the trial judge to be unavailable since it was self induced. The defendant, Bailey was a diabetic who had not taken sufficient food after his dose of insulin to combat its effects.

Another category of involuntary conduct which has been received much more sceptically by the courts is non-
organic automatism or psychogenic automatism. Such automatism may occur when there is subjection either to prolonged stress or to a sudden shock. In each case, a state of dissociation may result in which actions are performed without the exercise by the subject of conscious control. Glanville Williams states that "hysterical dissociation is a neurotic reaction to stress."[44]

The cases that came before the court had shown a marked inconsistency when the question of non-organic automatism was raised. Initially the Canadian courts seemed to respond well to what became known as "psychological blow automatism" as being grounds for acquittal since they fall into the category of non-insane automatism.

In the case of R.v.K.[45] the accused who had been suffering from depression for several months put forward a plea of automatism in answer to a charge of murdering his wife. He was said to have suffered shock which caused a state of dissociation on hearing that his wife was leaving him. Psychiatric evidence to the effect that the killing was done while the accused was in a state of automatism was accepted by the jury who were left to
decide both the question of automatism and insanity. The result was an outright acquittal.

In the case of R. v. Gottschalk,[46] the accused was charged with theft and assault. He told of intense headache and panic in his evidence. A psychiatrist described the accused's condition as chronic anxiety and depersonalisation which caused confusion, disorientation and had resulted in reflex action. His evidence was considered by the trial judge to be sufficient for a proper foundation to the plea of automatism. The accused was thus acquitted.

However, the case of Rabey v. R.[47] seem to present a stumbling block to those who seek non-organic automatism as a defence. The accused, Rabey who was a University student was emotionally attached to the victim. He assaulted her after she had rejected him and referred to him as a "nothing", by hitting her on the head with a rock that he had taken from a geology laboratory. The trial judge, sitting without a jury, acquitted the accused because there was a reasonable doubt as to whether he was in a state of automatism brought about by an external factor, and held that he was insane. The
Ontario Court of Appeal however allowed the prosecution's appeal and ordered a new trial. A further appeal to the Supreme Court of Canada was dismissed. The court approved the judgement of Martin J., who took the view that "the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a "disease of the mind....."[48]

Martin J. concluded that the trial judge had been wrong in holding that the dissociative state resulted from "an externally originating cause" and should instead have held that such a condition was a disease of the mind.

It follows from this decision that the chance of a state of dissociation being regarded as a type of non-insane automatism is extremely slim, though decisions from earlier cases of R. v. K. and Gottschalk seem promising. Mackay is of the view that "psychological blow automatism should be available as a complete defence when there is no evidence of a pre-existing mental pathology in the form of psychosis or personality disorder and the dissociated state is unlikely to recur. The actual degree or severity of the shock or stress may be
important in deciding whether the accused actually went into a dissociative state, but it should not be used to impose a restriction on the "external factor doctrine." [49]

The decision in Rabey is indeed most unfortunate for the accused has done nothing to show that he is any more dangerous to others than anyone else. It would only be reasonable to suspect that the court wished to restrict defences of non-organic automatism for policy reasons. It is this consideration which more than any other has led to the development of the "insane/non-insane automatism" dichotomy.

The Court of Appeal in England has also rejected the defence of non-insane automatism based on dissociation in the case of R. v. Isitt. [50] In this case, the accused was chased by the police after having caused an accident but managed to evade them. He claimed that he was in a state of shock and called medical evidence to support a defence based on hysterical fugue. The trial judge ruled that this evidence disclosed no defence for the jury to consider and the accused was thus convicted. The accused appealed on the ground that the judge had made a mistake of law in his ruling. The Court of Appeal considered the medical evidence that the accused's mind might have been
shut to the moral inhibitions caused by the shock, but was of the opinion that the appellant's condition was not within the legal concept of automatism, since there was no suggestion that his mind was not working at all. Lawton L.J. expressed the opinion of the Court as follows:

"It is a matter of human experience that the mind does not always operate in top gear. There may be some difficulty in functioning. If the difficulty does not amount in law to either insanity or automatism, is the accused entitled to say "I am not guilty because my mind was not working in top gear"? In our judgement he is not."[51]

(b) The Penal Code.

As has already been seen, the Penal Code provides no comprehensive definition of an "act" nor is any defence of automatism expressly provided. What then is the local position?

In the only local case to date, it was assumed that if an accused acted in an involuntary manner during an epileptic fit the only possible defence available to him
would be that of insanity under section 84 of the Penal Code.\[52\] In the case of *Sinnasamy v. Public Prosecutor*\[53\], the appeal was against the conviction of the appellant for the murder of his daughter aged 21 months. There was no discoverable motive for the killing of the child. The appellant, though he remembered in considerable detail the events and circumstances immediately preceding and immediately following the act, maintained that he had no recollection of the act itself or why he did it. There was a medical history that the appellant was an epileptic. The defence was that the appellant did the act when in a state of automatism, which is a temporary loss of consciousness associated with some types of epilepsy. The onus was on the appellant to set up this defence, and the question was, whether he had succeeded in bringing himself within the exceptions set out in section 84 of the Penal Code. The appeal was dismissed and it was held that the trial judge was right in rejecting the defence of automatism in favour of the theory that the appellant had acted on an irresistible impulse. Irresistible impulse per se is no defence, and can only be a defence when it is proved to have been a result of insanity in law.

It would seem therefore that the defence of automatism does not exist under the Penal Code, the insanity
provision of section 84 being the only relevant one and applying to all cases of involuntary conduct.

Stanley Yeo[54] has however put forth a strong opposing argument. His first proposal was that non insane automatism may be pleaded in the form of the rarely used defence of accident under section 80 of the Penal Code.[55] According to him, "The word "accident" in this provision does not mean a mere chance but rather an unintentional or unexpected act. In order for this defence to succeed, it must be shown that the act was an accident or misfortune, and was not accompanied by any criminal intention, but that on the other hand, it was the outcome of a lawful act which was done in a lawful manner, by lawful means and with proper care and caution."[56] He gives the example of a licensed driver who suffers concussion as a result of which he loses control of his vehicle and kills a pedestrian to illustrate how non-insane automatism could fall within this defence provision.

His second proposal in which non-insane automatism could be introduced locally is by considering it as a defence relating to the actus reus of an offence rather than as part of the mens rea. His view is that once the accused has suggested that he may have acted automatically, the prosecution is left to discharge the ultimate burden.
When non-insane automatism is treated in this manner, it raises the contention that the prosecution has not proved its case; it is therefore not a defence which the accused himself has to prove, such as those defences prescribed in the Code. He further argued that the Penal Code was only meant to be exhaustive in respect of defences which negate the mens rea of an offence. Accordingly, submissions that the prosecution has not proved the actus reus of an offence (such as when automatism is pleaded) have not been ruled out by the Code.

It is submitted that one of these arguments by Stanley Yeo must be accepted. If automatism is introduced into the law under the broad umbrella of the defence of accident in section 80, the onus will be on the accused to establish his defence on a balance of probabilities. Under the alternative argument, however, the onus will remain with the prosecution to establish beyond any reasonable doubt that the accused "acted" and that there was therefore an actus reus. In many ways this latter view is the more attractive. The wording in section 80 seems inapt to cover all cases of automatism. Take, for instance, the case of Cogdon[57]. It is surely inappropriate to assert that Mrs. Cogdon killed her daughter by "accident" or "misfortune" and it would be odd to allege that this occurred "in the doing of a
lawful act in a lawful manner, by lawful means." On the other hand, the alternative argument that there is no actus reus in such cases is clear and well established at common law. In most cases one will be interpreting an undefined word in the Penal Code such as "act" in section 299. In such cases it is permissible to receive established English common law provided such reception is not incompatible with the structure of the Penal Code. It is felt that no such incompatibility exists. On the contrary, the English common law approach makes sense. It is nonsense to describe unconscious movements as "acts" and simply inconceivable that anyone who caused a harm while in a state of unconsciousness (concussion after a car accident for example) could either be convicted or detained as insane after an appropriate finding under section 84.

Accepting this view that the defence of automatism is available in Malaysia, the precise parameters of the defence still need to be established. Certain categories of involuntary conduct such as physical compulsion, reflex actions of external origin and concussion seem clear to give rise to the full defence of automatism.
On the other hand, where the involuntary conduct is caused by "unsoundness of mind", it appears that only section 84 may be used. Those causing a harm while in the throes of an epileptic fit will fall within this category. This will inevitably have the consequence of forcing such persons to plead guilty to the offence charged.

More controversial are the remaining categories of those under hypnosis, somnambulism and hypoglycaemia. Under English law at present, each of these gives rise to a defence of automatism. In Malaysia, it can only give rise to a defence of insanity under section 84. There must be a strong case for classifying these three species of involuntary conduct as non-insane automatism, bearing in mind the respective consequences of automatism and insanity.

Much as we would like to think that the defence of automatism can be made available at least in relation to some of the categories of involuntary conduct, it is also submitted that the common law restrictions must also apply if it was the accused's own fault that he got himself into the state of automatism. There are strong policy arguments to support such a view, for it is the
business of criminal law to punish the blameworthy who cause the harm. Where a person has in a blameworthy manner allowed himself to get into a state of automatism and then causes a harm, it would be highly unrealistic to expect any court to accede to the technical argument that as the movements were involuntary, the accused must be acquitted.

Finally, it must also be noted that the defence of automatism is a recent one which was never in the contemplation of the 19th Century jurists concerned with criminal law. Had the defence then been present under English law, it is probable that Lord Macaulay and the other Indian Commissioners would have expressly included it in the Penal Code. It is however never too late for the legislature to do so.

2. Omissions.

Section 32.

In every part of this Code[58], except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.
**Section 33.**

The word "act" denotes as well a series of acts as a single act; the word "omission" denotes as well a series of omissions as a single omission.

**Section 43.**

The word "illegal" is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be "legally" bound to do" whatever it is illegal in him to omit.

An "act" generally means something voluntarily done by a person. "Act" is a determination of the will, producing an effect in the sensible world. This word includes writing and speaking, or, in short, any external manifestation. In the Code the term "act" is not confined to its ordinary meaning of positive conduct of doing something but includes also illegal omissions.[59]
The effect of section 32 and section 33 taken together is that the term "act" comprises one or more acts or one or more illegal omissions. The Penal Code thus makes it plain that while criminal liability always flows from positive acts of commission (provided causation and mens rea are established), there is no liability for omissions to act unless the omission can be said to be "illegal" as defined by section 43. In other words, criminal liability in these cases is completely dependent upon the existence of a duty to act. This means that a stranger can with impunity watch a small child drown in a shallow pool even though he could have saved the child's life with a minimum of effort and with no risk to himself. His omission is not "illegal" within the meaning of section 43 and thus there is no actus reus of any offence. Glanville Williams is of the view that though a crime can be committed by omission, there can be no omission in law in the absence of a duty to act. The reason is obvious. "If there is an act, someone acts; but if there is an omission, everyone (in a sense) omits. We omit to do everything in the world that is not done. Only those of us omit in law who are under a duty to act."[60]

The essential characteristic of omissions which entail criminal liability is the breach of a legal, as distinguished from a merely moral duty. The legal
obligation may be imposed by the general law or undertaken voluntarily, for example, by contract, as in the case of a surgeon or nurse. According to McCall Smith and Sheldon, the reluctance to impose liability on the basis of an omission "is attributable in part to conceptions of causation which tend to downplay the causative potency of omissions and in part to a desire to limit the extent of criminal liability. While everybody can appreciate the causal link between positive acts and their consequences, the equivalent link between omissions and their consequences tend to be less readily acknowledged." [61]

The crucial matter thus becomes one of determining the precise circumstances in which an omission is "illegal". Under section 43 of the Malaysian Penal Code, the word "illegal" has been given a very wide meaning as it includes:

(1) Everything which is an offence.
(2) Everything which is prohibited by law, and
(3) Everything which furnishes ground for civil action.
(a) **Failure to act which is "an offence".**

This refers to omissions that are independently made criminal offences by the Penal Code or other statutes. For example, Section 288 of the Penal Code provides:

> Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof ........ shall be punished ........

Thus if an accused failed to exercise the requisite care and control over such an activity with the result that it killed a person, the accused's failure to act would be an "illegal omission" which could constitute the requisite actus reus of the offence of culpable homicide.

In the case **Lee Sai Yan v Public Prosecutor**[62], the accused, a site engineer on a building worksite, did nothing to prevent the deceased entering a bored hole which needed cleaning. The deceased, wearing no breathing apparatus, was lowered into the deep hole in a bucket where he died from asphyxia due to insufficient oxygen. The accused was charged under Section 81(12) of the Factories Act 1973 with the offence of facilitating a
crime under Section 34(8) of the Factories Act 1973. Section 34(8) provides that "No person ........ shall require, permit or direct any other person to enter or remain in, any confined space in which the proportion of oxygen in the air is liable to have been substantially reduced unless either (a) he is wearing a suitable breathing apparatus ........" The Company, Penta Ocean, for whom the accused worked had already been convicted of this offence. The question arose as to whether the accused had "facilitated" this offence.

The prosecution's case was that by making no attempt to stop the deceased from going down when he was not wearing breathing apparatus, the accused was said to have facilitated the result. The accused however contended, that to facilitate required active participation.

The statutory duty imposed upon the accused was located in Section 34(8) of the Factories Act. His neglect was that he omitted to perform the duty imposed by law, i.e. permitting the deceased to enter the bored hole when he was not wearing a breathing apparatus and when no tests were conducted.
The accused's omission to act in this case was thus held to be an offence. Accordingly, under Section 43 of the Penal Code, it was an illegal omission. It follows that if the prosecution had wished to charge the accused with a more serious homicide offence under Section 299 or Section 304 A of the Penal Code, there would have been no problem in establishing the requisite actus reus of these offences (subject to causation being established). Both require the accused to have committed an "act". Under Section 32 this illegal omission would have constituted such an "act".

(b) Failure to act which is "prohibited by law"

Many failures to act which are "prohibited by law" are offences and will thus come under the first category already discussed. However, the two terms are not synonymous. Certain failures to act could be "prohibited by law", yet not be offences. For instance, Section 115 of the Women's Charter (Cap 353) in Singapore provides that "it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children ...... either by providing them with such accommodation, clothing, food and education as may be reasonable ......" While such a failure to act is prohibited by law, it is
not in itself an offence. However, being "prohibited by law" it will constitute an illegal omission capable of forming the actus reus of a criminal offence. Such a failure would also probably furnish grounds for a civil action and thus come within the third category as well.

In the Indian case of De' Souza v Pashupati Nath Sarkar[63], the defendant was captain of a ship which arrived at Sandhead 110 miles off the port of Calcutta and had to wait there for pilotage. While there the deceased, a junior engineer on the ship, fell ill. When his condition deteriorated, several requests were made of the captain to remove the sick man to Calcutta. For five days, from the first request for removal, nothing was done. During this period, at least five ships, including some belonging to the same company as the accused's ship, left Sandhead daily for Calcutta. No request was made for any medical help from any of these ships. On the fifth day the ship was piloted into Calcutta Port and the accused radioed for the deceased to be removed to the hospital. The following day the deceased died of infective hepatitis with hepatic coma and hepato renal failure. The accused was charged, inter alia, with an offence contrary to Section 304 A Indian Penal Code but petitioned the High Court to have the proceedings against him quashed.
Though the process issued against the accused under Section 304A was nevertheless quashed on grounds of lack of causation, the arguments raised illustrated an example of an omission which is prohibited by law.

According to T.P. Mukherji J, "The petitioner contends that the process so far as it related to an offence under Section 304A, Indian Penal Code is wholly misconceived in as much as his client in the matter of the treatment of the sick engineer can by no stretch of imagination be held to be the efficient and proximate cause of the latter's death. He considered that an illegal omission may constitute an "act" in law, but when no legal duty is cast in the matter, failure to perform that duty is not illegal. As the petitioner in the case ...... had no legal obligation to provide for the treatment of the sick person over and above the facility available in his ship, his failure to remove the ailing engineer to Calcutta for better treatment cannot be construed as an illegal omission in that regard. If the omission to act was not illegal, that omission would not constitute an "act" and however negligent the petitioner might have been in the
matter of that omission it would not be a negligent act as contemplated in Section 304A, Indian Penal Code......"

Section 304A, Indian Penal Code provides for punishment of the offence of causing death by a rash and/or negligent act. Under Section 32, Indian Penal Code, an illegal omission would constitute an "act" in law and under Section 43 of the Code the word "illegal" is applicable to everything which is an offence and which is prohibited by law or which furnishes ground for a civil action. An illegal omission thus is an "act" under Section 304A, Indian Penal Code and may constitute an offence if it is negligent.

The Prosecutor referred to Section 190 of the Merchant Shipping Act which according to him cast a duty on the master of the ship to do any lawful act proper and requisite to be done by him for preserving any person belonging to or on board the ship from danger to life. He contended that this Section imposes on the master of the vessel the duty of taking proper and requisite action for preserving any person on board the ship from danger to life and in that regard, in the background of the facts of this case, it was the duty of the petitioner, as the master of the ship, to take all possible steps, care
and precaution in the matter of the treatment of the ailing engineer and to try and arrange for his removal to Calcutta for better treatment when such arrangement could easily have been made by him.

The relevant provision of Section 190 of the Merchant Shipping Act runs as follows:

"No Master, Seaman, or Apprentice belonging to an Indian ship wherever it may be or to any other ship while in India shall knowingly .......
(b) refuse or omit to do any lawful act, proper and requisite to be done by him for preserving the ship from immediate loss, destruction or serious damage, or for preserving any person belonging to or on board the ship from danger to life or from injury."

When, therefore, Section 190 of the Act imposes on the master of the ship the duty of doing all lawful acts proper and requisite to be done for preserving persons belonging to or on board the ship from danger to life, it demands of him to take every possible legal step.

According to T.P. Mukherji J., "In my view, Section 190 (b) embodies a statutory obligation of the master of a vessel to take all possible steps when a person on the
ship becomes sick, to arrange for his best available treatment for the purpose of preserving his life. Whether all possible steps in that regard were taken in this case or not is a question of fact which has to be determined by the Magistrate, if and when the case comes to trial.......

(c) **Failure to act "which furnishes ground for a civil action".**

To discover whether an omission to act furnishes "ground for a civil action" necessitates reference to the civil law of Malaysia, primarily the law of torts. Such law is for present purposes virtually identical to English law. This, however, by no means solves the problem for two reasons. First, the English civil law on this topic is far from clear. Second, the extent to which it is permissible to rely on English criminal cases on this matter is controversial. These English cases initially based themselves on the English civil law, thus inducing all the Indian commentators to assume that reference to them is permissible. However, there has been a growing awareness in the United Kingdom that great caution needs to be exercised before indulging in any cross-referencing between criminal law and civil law as the objects of
these two branches of the law are so diverse. The result has been that English criminal cases have developed independently of civil cases. The Penal Code, however, wisely or not, specifically links criminal liability for omissions to civil liability. It thus follows that before any English case can be used in Malaysia and Singapore care must be taken to ensure that it reflects the civil law as well as the criminal law.

Bearing this in mind, it would appear that the law is as follows: an omission only furnishes ground for civil action and thus criminal liability if the accused is under a duty to act. Such a duty to act arises in the following circumstances:

(i) **Special relationship.**

Where there is some close relational basis for a duty to act, criminal law does impose liability for omissions. Example of this would be parental duty of care and support for a child and duty of husbands and wives to aid each other.
In the case of *Om Prakash v. State of Punjab*[^64], the accused starved his wife by omitting to feed her and denying her permission to leave the house.

According to Raghubar Dayal J., "Counsel for the appellant......concedes that it is only when a person is helpless and is unable to look after himself that the person having control over him is legally bound to look after his requirements and to see that he is adequately fed. Such persons, according to him, are infants, old people and lunatics. He contends that it is no part of a husband's duty to spoon feed his wife, his duty simply to provide funds and food. In view of the finding of the court below about (the victim's wife) being confined and being deprived of regular food in pursuance of a scheme of regularly starving her in order to accelerate her end, the responsibility of the appellant for the condition she was brought......is clear. The findings really go against any suggestion that the appellant had actually provided food and funds for his wife......"

What is the basis of the duty in such cases? Is it that the blood and marriage relationship is so strong that it generates a duty to act? This cannot be the case because
no duty would be owed to one's separated spouse or one's emancipated child.\[^{65}\] Presumably, the better rationale is that one owes a duty to those who are dependent on and reasonably expect assistance from one. To this extent it could thus be argued that this whole category can be subsumed within the following broader one.

(ii) **Duty voluntarily assumed**

Even though there may be no special relationship between the parties, if one person voluntarily assumes a responsibility towards another, a legal duty to act will have been created. As seen above, the real basis of the duty in such cases is the dependence and reasonable expectation of assistance springing from such a gratuitous assumption of responsibility.

In the case of **R v. Instan**,\[^{66}\] the accused lived with her aunt who was seventy three years old. The aunt who had been healthy until shortly before her death, developed gangrene in her leg. During the last twelve days of her life she could not fend for herself, move about or summon help. Only the accused knew of her condition. The accused appeared not to have given the deceased any food and did not seek medical or nursing assistance. The accused was charged with manslaughter and convicted.
Lord Coleridge CJ. in his judgement stated that, "We are all of the opinion that this conviction must be affirmed. It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. There is no question in this case that it was the clear duty of the prisoner to import to the deceased so much as was necessary to sustain life of the food which she from time to time took in, and which was paid for by the deceased's own money for the purpose of the maintenance of herself and the prisoner; it was only through the instrumentality of the prisoner that the deceased could get the food. There was, therefore, a common law duty imposed upon the prisoner which she did not discharge.

Nor can there be any question that the failure of the prisoner to discharge her legal duty at least accelerated the death of the deceased, if it did not actually cause it. There is no case directly on point; but it would be a slur upon and a discredit to the administration of justice in this country if there were any doubt as to the legal principle, or as to the present case being within
it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty. It is unnecessary to say more than that upon the evidence this conviction was most properly arrived at."

In the case of R v. Stone and Dobinson[67], the appellants were convicted of manslaughter. The first appellant's sister, who was described as "eccentric in many ways" and "morbidly and unnecessarily anxious about putting on weight", became infirm while lodging with the appellants. She remained immobile in bed for several weeks, and eventually died of toxaemia from infected bed sores and prolonged immobilisation. The appellants made no more than a half-hearted attempt to secure her medical attention.

The appeals against conviction failed because a duty was held to be owed by one of the accused to his elderly sister. It is not clear how wide the category of other relationships is. If two people go jungle trekking together, can it be said that they have assumed a
responsibility towards each other that, in the event of any emergency, each will act to rescue the other? Certainly, there would be a reasonable expectation of assistance in such cases. By the same token, if one goes shopping in Princes Street with a business colleague, one will certainly expect assistance from him should an accident befall one, but how does the act of simply going shopping with another generate a duty to act? It is unlikely, however, that these intractible problems will ever trouble the court as a criminal prosecution is only likely to be brought in clear cases such as Instan and Stone and Dobinson where a helpless person has been taken into the home of the accused and being thus isolated from the rest of the world is totally dependent on the accused. It may be that the concept is one of living together in the same household. So there may be a duty between unmarried partners, between landlord and tenant or even between fellow lodgers, depending on the extent to which there is a genuine sharing of life together. Stone's co-accused, Dobinson, for example was related neither to the victim nor to the other accused, but they all shared the household together. Her liability, however, was argued not on the basis of this but on the basis of her having voluntarily undertaken responsibility for her partner's sister. Similarly in Instan, although there was a relationship of aunt and neice, there were also other factors pointing to at least a voluntary
undertaking if not an actual contractual relationship. It would therefore depend on the circumstances of a particular case whether a prosecution could succeed on the basis of a lesser relationship, or of a shared household.

(iii) **Duty assumed by contract.**

A contractual responsibility that he has undertaken, either by a contract with the victim or even a third party can be the source of the accused's liability. A clear example of this is the case of *R v. Pittwood.*[68] The accused was a railway gatekeeper who was employed to keep the gate shut whenever a train was passing during the period 7 a.m. to p.m. Not many trains used to pass during this day period. One day he left the gate open with the result that a train hit a hay cart crossing the line killing one man and injuring another seriously. The accused was charged with manslaughter.

It was argued on behalf of the accused that it was necessary that the duty to take care should be towards the person who complained; and that, in the present case, the accused only contracted with his employers, the railway company.
Mr. Justice Wright however said that he was clearly of the opinion that in this case there was gross criminal negligence, as the man was paid to keep the gate shut and protect the public...... The principle in the case of Instan[69] that a man might incur criminal liability from a duty arising out of contract clearly governed the present charge.

The accused was found guilty and sentenced to three weeks imprisonment. In both the cases of Instan and Pittwood, there was assumption of, or acquiescence in, a legal obligation and, subsequently, the culpable infraction of a duty imposed or undertaken. These elements, together with the causal nexus between breach of the duty and occurrence of the harm, are necessary requirements of an omission being held to constitute the actus reus of a crime.

(iv) Creating dangerous situation.

In the case of R v. Miller,[70] one night while squatting in someone else's house, the appellant lit a cigarette and lay down on a mattress in one of the rooms. He fell asleep before he had finished smoking the cigarette and
it dropped onto the mattress. Later he woke up and saw that the mattress was smouldering. He did nothing about it; he merely moved to another room and went to sleep again. The house caught fire. The appellant was rescued and subsequently charged with arson, contrary to Section 1(1) and (3) of the Criminal Damage Act 1971. At his trial he submitted that there was no case to go to the jury because his omission to put out the fire, which had started accidentally, could not in the circumstances amount to a sufficient actus reus. The judge ruled that once he had discovered the mattress was smouldering the appellant had been under a duty to act. The appellant was convicted. The Court of Appeal upheld his conviction on the ground that his whole course of conduct constituted a continuous actus reus. The case went on appeal to the House of Lords, and the decision was affirmed.

One way of explaining the decision is to hold that since starting the fire was D's act, that this act continued as the bed burned, and that when D realised this and knew that the fire might spread, this amounted to recklessness which combined with his continuing act so as to constitute the crime. This "continuous act" approach was urged by Professor Glanville Williams. [71]
Lord Diplock, with whom all their Lordships agreed, expressed some support for the "duty" theory urged by Professor J.C. Smith, as having the merit of being easier to explain to the jury but then added that he would prefer "responsibility" instead of duty. He thought that "duty" was:

"...more appropriate to civil than to criminal law since it suggests an obligation owed to another person, i.e. the person to whom the endangered property belongs, whereas a criminal statute defines combinations of conduct and states of mind which render a person liable to punishment by the state itself."

Under the "duty theory", whenever a person creates the risk of harm by an act and subsequently realises this risk, there is a duty to take steps to avert or minimise that risk. This may require personal action by D, or the summoning of the emergency services, or both. Where D created the risk intentionally in the first place there is clearly a duty to prevent it from materialising, and a mere renunciation of intention after the original act but before the prohibited result is insufficient to relieve D of liability.
This is an English criminal case basing the accused's liability (or, at least the actus reus element thereof) on his omission to act. How would a civil court handle the facts of Miller,[73] bearing in mind the necessity for the failure to act to furnish "ground for a civil action" under Section 43? It is clear that there would be liability in such a case at civil law, but the civil courts would approach the problem in a different manner focusing on the defendant's negligent "positive" act of going to sleep with a lit cigarette. He owed a duty of care to anyone who might be injured by such positive actions. However the result is achieved, the end product is the same: there are grounds for civil action in the circumstances, rendering the omission "illegal" for purposes of Section 43. Indeed, there is no reason why the criminal courts could not also base liability upon such positive acts of commission (especially if the only mens rea that need be established were negligence). Miller's positive act would be going to sleep with a lit cigarette. Of course, he might have had no subjective mens rea at that stage, but it would clearly be a negligent course of action.

In the case of Benoy Chandra Dey v. State of Calcutta,[74] the accused (petitioner) applied for revision of the judgement dismissing his appeal and
confirming his conviction under Section 304-A of the Indian Penal Code. A naked, live galvanized electric wire had been connected from the house of one Gopal to that of the petitioner. A 13-year-old boy while passing in front of the petitioner's house touched the wire and died instantly from electric shock. The petitioner submitted that there was no evidence to show that either the petitioner was personally responsible for taking the electric connection from Gopal's house or that he knew that such a connection was there.

In his judgement, J.N. Chaudhuri J. stated that, "It is not necessary on a charge under Section 304-A, Indian Penal Code, as in the present case, that the petitioner must have personally got the electric connection from Gopal's house. Allowing the AC connection to remain in this bare, uninsulated dangerous situation, is sufficient negligence on his part to bring him within the ambit of the Section, even if he was not personally responsible for procuring the electric connection in question. Under Section 32 Indian Penal Code, acts include illegal omissions. In the case of S.N.Hussein v. Andhra Pradesh, [75] ....... the Supreme Court has laid down that "culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its
reasonableness will always depend upon the circumstances of each case.

The fact that an electric bulb was burning in the petitioner's room at the time of the incident and that the connection had been taken 2/3 days before, leaves little room for doubt as to the knowledge of the petitioner about the electric connection...... We are satisfied of the petitioner's criminal negligence within the meaning of Section 304-A Indian Penal Code in this case......"

The principle established in such cases is potentially extremely broad. Many of the classic tort examples, such as building a swimming pool without erecting a fence around it with the result that a small child falls in and drowns, could give rise to criminal liability. The failure to erect a protective fence would furnish "ground for a civil action" rendering such a failure to act an "illegal omission". However, in most cases the requisite degree of criminal negligence would not be established and even if there were a chance that it could be, it is unlikely that a criminal prosecution would be brought.

English criminal law seems to have taken an approach that is variable towards liability for omissions. In general, the conventional view is favoured but occasionally liability is extended from an act to an omission where linguistic considerations appear to favour this.

Ashworth is of the view that when there is a moral duty to act, there cannot be seen any moral difference between an act and an omission. According to him, "The general principle in criminal law should be that omissions liability should be possible if a duty is established, because in those circumstances there is no fundamental moral distinction between failing to perform an act with foreseen bad consequences and performing the act with identical foreseen bad consequences." He gave the example of the duty to take reasonable steps in assisting
a person in peril, which is sometimes termed as the duty of easy rescue. Ashworth cannot agree with the conventional view that embodies a minimalist stance on criminal liability for omissions, whose advocates include among others Lord Macaulay and Fletcher.[78]

Although Ashworth concedes that all types of offence vary in their seriousness and that on the whole omissions are less culpable than acts, he stresses that it would not follow that omissions are therefore less suitable for criminal prohibitions than acts. According to him, "on the social responsibility view, then, there is no reason to accept the limitation imposed on omissions liability by the conventional view."[79]

Williams who discovered that he too belonged to the conventionalist school of thought on the issue of criminal liability for omissions has stated as follows, in his reply to Ashworth:

"First, omissions liability should be exceptional, and needs to be adequately justified in each instance. Secondly, when it is imposed this should be done by clear statutory language. Verbs primarily denoting (and forbidding) active conduct should not be construed to include omissions except when the statute contains a
genuine implication to this effect - not the perfunctory and fictitious implication that judges use when they are on the lawpath instead of the purely judge-path. Thirdly, maximum penalties applied to active wrong doing should not automatically be transferred to corresponding omissions; penalties for omissions should be rethought in each case."[80]

In justifying the conventional view, Williams put forth a number of arguments. Firstly, society's most urgent task is the repression of active wrongdoing rather than bringing the ignorant or lethargic up to scratch which according to him, is very much a secondary endeavour, for which the criminal process is not necessarily the best suited.

Secondly, our attitudes to wrongful action and inaction differ. A moral distinction is almost always perceived between (for example) killing a person and failing to save his life. This moral distinction, according to Williams, reflects differences in our psychological approach to our own acts and omissions, for we have much stronger inhibitions against active wrongdoing than against wrongfully omitting.
Thirdly, there is the complexity and difficulty of formulating crimes of omission which are rarely directed against the whole world as compared to crimes of commission which can usually be formulated by stating the forbidden conduct. Thus, when one propose to punish omissions, one would be left with the problem of defining the scope of the legal duty. Williams gave the example that though, the courts can, in theory, punish everyone who knowingly kills, they cannot punish everyone who fails to save life, without some minimum specification of whose lives are to be saved.

Fourthly, when crimes are expressed with the use of verbs implying action, it is a breach of the principle of legality to convict people of them when they have not acted; and it is unfair "labelling" to convict non-doers of acts under the name of doers.

Finally, the law enforcement agencies (including the courts) have their work cut out to deal with people who offend by active conduct. As it is, the prisons are packed with them. According to Williams "to extend the campaign by attempting to punish all (or large groups of) those who contribute to the evil result by failing to co-
operate in the greater endeavour of producing a happier world would exceed the bounds of possibility."[81]

Lord Macaulay and the other Indian Law Commissioners put forth this justification in taking a middle course with regard to liability for omissions:[82]

"...... On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. It is difficult to say whether a Penal Code which should put no omissions on the same footing with acts would produce consequences more absurd and revolting. It is plain therefore, that a middle course must be taken. What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect shall be punishable in the same manner; provided that such omissions were, on other grounds, illegal. An
omission is illegal....if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.....

We are sensible that in some of the cases which we have put our rule may appear too lenient. But we do not think that it can be made more severe, without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man, - a worse man, probably, than many of those whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line.

If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard-earned rice? Again: if the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees? ........
It is indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active services to their neighbours. In general however the penal law must content itself with keeping men from doing positive harm and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation."
C. Mens Rea

1. Introduction

Actus non facit reum nisi mens sit rea, means that the act itself does not make a man guilty unless his intentions were so. This maxim is generally supposed to mean that there cannot be such a thing as legal guilt when there is no moral guilt. This concept of the guilty mind, is the device through which those who are thought to be deserving of punishment because of their responsibility, their moral blameworthiness, are primarily identified. In Blackstone's words, "as a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all."[83]

While it is easy enough to state the general principle, it is much more difficult to work it out in detail. No problem of criminal law is of more fundamental importance or has proved more baffling through the centuries than the determination of the precise mental element or mens rea. Generally, criminal liability is only imposed upon a blameworthy actor whose conduct has caused a forbidden harm. The classic writers on criminal law used the maxim as a basis for justifying all those excuses which have
traditionally been recognised as defences to a charge of crime such as infancy, duress, coercion, insanity and so on. It is not enough that the defendant has simply done the forbidden act or caused the prohibited harm. He must have done so in circumstances in which he can properly be blamed for his conduct. Without such blame or fault he is regarded as "innocent", and a civilised society is offended at the notion of punishing the innocent. Thus the two essential elements necessary to constitute a crime must be present, namely, (a) the physical element which is also known as actus reus and (b) the mental element, commonly known as mens rea.

The physical element that constitutes a crime is obvious, because it is externally manifested by the wrongful act committed by the accused. But the wrongful act done by the accused is not in all cases punished. These are cases where another maxim of an equal importance is applicable, namely, actus me invito factus non est meus actus, which means an act which is done by me against my will is not my act. This maxim only supports mens rea. If the act has been done by me against my will, it will not be my deliberate act or intended act and therefore I shall not be punished for it. For example, A shoots at a jackal. X is behind the bush and is hurt by accident. X will not think of retribution as it is a case of accident. But it will be different, if A shoots at X deliberately. So also we feel indifferent if an insane
person abuses us, but how shall we feel if an adult of mature understanding were to abuse us? Perhaps we shall feel inclined to knock him down. In the first case we feel no injury but in the latter case we feel greatly injured. Why? The reason is obvious. In the one case, the act was not willed or intentional; in the other case, it was a willed act or intentional act, and therefore, it provokes us to retaliate.

But what is the true meaning of mens rea has exercised the minds of the jurists for a considerable time. Stephen says that this expression is meaningless. Dr. Stallybrass observes: "It is not easy to arrive at a true meaning of mens rea at the present day."[84] Justice Stephen said:

"Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading on the following grounds: it naturally suggests that apart from all particular definitions of crimes, such a thing exist as a mens rea or "guilty mind", which is always expressly or by implication involved in every definition. This is obviously not the truth, for the mental element of different crimes differ widely. Mens rea means, in the case of murder, malice aforethought; in the case of theft an intention to steal;
in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases, it denotes mere inattention. For instance, in the case of manslaughter by negligence, it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a mens rea or guilty mind. The expression, again, is likely to and often does mislead. To a non-legal mind, it suggests that by the law of England no act is a crime which is done from laudable motive, in other words, that immorality is essential to crime."

Notwithstanding these strictures, the significance of the maxim has been stressed in a number of modern judgements. In *Brend v. Wood* for example, Lord Goddard C.J. said;

"It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has the guilty mind."
Thus, mens rea is the mental element required by the definition of a particular crime. It clearly embraces those who have made a decision and chosen to break the law. It also covers those who act realising there is a chance of their conduct causing the prohibited result. And in some cases it could even extend to persons who do not anticipate causing any harm, but who really ought to have realised the risks involved in their actions. In short, mens rea does not refer to any single state of mind. There are in fact, degrees of mens rea. As was rightly pointed out by Stephen J. in the case of Tolson\[87\], mens rea means a number of quite different things in relation to different crimes. Thus one must turn to the definition of particular crimes to ascertain the precise mens rea required for specific offences.

(a) Specific mens rea terms.

Many sections of the Penal Code and of other statutes creating criminal liability, specifically spell out the need for mens rea and indicate exactly which species of mens rea must be proved. For instance, section 142 of the Penal Code makes it an offence if a person
"intentionally joins" an unlawful assembly.[88] Section 275 makes it an offence if a person "knowing any drug or medical preparation to have been adulterated...." sells etc. such drug. Section 304 A makes it an offence if a person "causes the death of any person by doing any rash or negligent act...." Section 378 defines theft as "intending to take dishonestly any movable property...."

Numerous other mens rea terms are to be found in the Penal Code and in other statutes creating criminal liability eg. recklessness, voluntarily, fraudulently, wantonly, malignantly, corruptly, maliciously, dangerously, etc. These mens rea terms vary according to the nature of the different crimes. The meaning of mens rea can only be ascertained by reference to the particular definition of a particular crime. What is an evil intent for one kind of offence may not be an evil intent for another. For instance, the evil intent in offences against property is wholly different from what it is in offences against the human body. One could say, therefore, that the term mens rea is a technical form of shorthand for a number of conditions that need to be met in order for criminal liability to follow. Let us look at the meaning of some of the main mens rea terms found in the criminal statutes.
(i) Intention.

The concept of "intention" is nowhere defined in the Penal Code. The Christian moral code may condemn evil intention just as much as evil deeds but it is unnecessary for the law to go to such lengths. Evil intentions only become sufficiently dangerous to society to merit punishment when the agent has gone a considerable distance towards carrying them out. According to Salmond, [89] "Intention is the purpose or design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, in as much as they fulfill themselves through the operation of the will. An act is intentional if, and in so far as, it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied."

Intention refers to the consequences which directly follow our act, while motive corresponds to the ulterior end. A person clearly intends a consequence if he wants that consequence to follow from his action.
"Intention is an operation of the will directing an overt act; motive is the feeling which prompts the operation of the will, the ulterior object of the person willing, example if a person kills another, the intention directs the act which causes death, the motive is the object which the person had in view, example the satisfaction of some desire such as revenge, etc."[90]

Thus intention refers to the consequence which directly follows an act, while motive corresponds to an ulterior end which is at the root of the intention. In the Malaysian Penal Code, the word "intent" denotes both intention and motive. It is usual to say that although a person's motive may be good, he will be liable for his intentions were wrongful. For example, a Hindu removes a cow from the possession of a Muslim in order to save it from slaughter. His motive is good and even laudable, namely, saving the life of a cow held to be very sacred according to his religious belief. In snatching it from the possession of a Muslim, he does not intend to appropriate it himself. But in snatching the cow there is an intent to cause wrongful loss of it to the Muslim; hence he is liable in spite of his laudable motives.
Intention must therefore not be confounded with motive. Intention shows the nature of the act which the man believes he is doing. Motive, on the other hand, is the reason that induces a man to do the act which he intends to do and does. Therefore, if his act is absolutely legal, the motive which prompted him to do it cannot make it illegal. For example, an executioner bears an ill will against X, his enemy, who is sentenced by the court of law to be hanged. The executioner, in execution of the legal sentence, hangs him and thus gratifies his spite. Here his motive in hanging him may be to gratify his spite, but, since he is doing a perfectly legal act in a proper manner, he is not liable. Conversely, an absolutely illegal act cannot become lawful by being done for any excellent motive. For example, a man and his child are almost on the verge of starvation and if he steals the goods for saving himself and his child from starvation, he would be held guilty, although his motive may be excellent because he wanted to save the life of his child. Intention, as we have seen above, is a mere mental act and so is difficult to prove. We infer the intention from the act itself or from the surrounding circumstances. Sometimes, intention and motive are used synonymously, but as a matter of fact they are clearly distinguishable as we have seen above. Intention has relation to the immediate, motive to the distant or ulterior objects of our acts. Salmond has put it thus:
"Every wrongful act may raise two distinct questions with respect to the intent of the doer. The first of these is: how did he do the act - intentionally or accidentally? The second is: if he did it intentionally, why did he do it? The first is an enquiry into his immediate intent, the second is concerned with his ulterior intent or motive."[91]

Thus, it may be stated that while intention is the state of mind consisting of desire that certain consequences shall follow from the party's physical act or omission, motive is the ulterior intention - the intention with which an intentional act is done or more clearly the intention with which an intentional consequence is brought about. Intention when distinguished from motive relates to the means, whereas motive to the end.[92]

The case of R v. Nedrick[93] is the culmination of a long line of controversial English decisions attempting to define "intention". In this case, the accused, after threatening to burn out a woman against whom he bore a grudge, poured paraffin through the letter-box of her
house and set it alight. The woman's child was killed in the resulting fire and the accused was charged with murder. He claimed that he merely wanted to frighten the woman and did not want anyone to die. The question arose as to whether knowledge as to the consequences of his actions was the equivalent of an intention to cause those consequences.

Lord Lane C.J. stated in his judgement:

"Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached on a consideration of all the evidence."
Under the Malaysian Penal Code however, it is clear that foreseeing or knowing a consequence to be likely or probable is not the equivalent of intending that result. Section 39 draws a sharp distinction between the two states of mind in defining "voluntarily" as encompassing either an intention to cause a result or knowledge that it is likely to be caused.

In the case of *R v. Nedrick*[^94] it was stated that foresight is not the same as intention, but that foresight (of the correct degree) may provide evidence of the existence of intention. It is an open question whether such a conclusion is supportable under the Malaysian Penal Code.[^95] In defining murder, section 300, draws a distinction between intending death (section 300 (a))[^96] and knowing that one's acts are so imminently dangerous that they must in all probability cause death (section 300 (d)).[^97] This latter state of mind does not amount to intention. If it did, section 300 (d)[^98] would be unnecessary.

The line between "knowing that one's actions must in all probability"[^99] cause a result and knowing that one's actions are "virtually certain" to cause a result[^100]
is, at best, an exceedingly thin one. If it is felt to be too thin a line to draw then there seems little alternative but to limit the concept of "intention" to those cases where the defendant meant to cause the result - where it was his aim or purpose in acting. Anything less such as foreseeing a consequence as even "virtually certain" would then not amount to intention, but only to knowledge or recklessness.

In any case, in the construction of mens rea terms, except where a definition is contained in our law,[101] guidance may be sought legitimately from English decisions, although they are not binding on the courts of Malaysia.

(ii) Knowledge.

There is no definition of the term knowledge in the Penal Code. According to Nigam,[102] "To know a thing means to have a mental cognition of it. To believe a thing is to assent to a proposition or affirmation or to accept a fact as real or certain without immediate personal knowledge. Thus knowledge and "reason to believe" are to be clearly distinguished. For example, a man you know to
be poor brings to you for sale a valuable gold ornament and offers it to you for one-tenth of the real price. He comes to you at night under suspicious circumstances. Here you may not know that the article is stolen, but you have reason to believe that it is stolen. Thus belief is somewhat weaker than knowledge but a well-grounded belief that certain consequences will follow a certain act is ordinarily as good as knowledge."

Section 26 of the Malaysian Penal Code[103] states that "a person is said to have reason to believe that thing, if he has sufficient cause to believe that thing, but not otherwise." Thus, for example, A sets fire during the night to an inhabited house in a large town for the purpose of facilitating robbery and thus causes the death of a person. In this case, the person did not have the knowledge that the house was inhabited, but he had reason to believe that this was so. Belief is thus weaker than knowledge. "Knowledge," says Locke,[103a] "is the highest degree of the speculative faculties and consists in the perception of the truth of the affirmation or negative propositions."

It may also be noted that "knowledge and reasonable grounds of belief in most cases supply the place of
intention. Intention is purely an operation of the mind and is often difficult to prove. Therefore, it is inferred from the surrounding circumstances and the acts of the person. Every man is supposed to intend the natural consequences of his act. Such inferences are sometimes based on certainty, sometimes on different degrees of probability. Where an inference is more or less certain, we say it is based on knowledge; where it is only probable, it is based on belief. In many cases, however, a reasonable ground of belief for all practical purposes is as good as knowledge."[104]

Strictly speaking, one cannot know something unless that something is in fact so. For example, one cannot know that goods are stolen unless they are in fact stolen. This is an extremely strict test which would mean that no knowledge could be imputed to a handler of stolen goods unless it could be affirmatively established that the goods were indeed stolen. The Malaysian Penal Code however avoids this problem in relation to stolen goods by section 411 adopting the broader mens rea test that the accused will be liable if he knows or has reason to believe the goods are stolen.[105] If the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the articles that were found in the possession of the
accused were stolen property, although the circumstances may fall short of carrying absolute conviction to his mind on the point, a person must be said to have "reason to believe." [106]

Difficulties may also be encountered in applying this test to many sections of the Penal Code, where the requisite knowledge must relate to the consequences of the accused's actions. For example, how can one know that one's actions are "so imminently dangerous that" they "must in all probability cause death" contrary to section 300(d)? [107] One can suspect, think or believe that they will be so dangerous, but one simply cannot know anything speculative.

It is therefore submitted that a more flexible interpretation of "knowledge" and its grammatical variants needs to be adopted - perhaps along the lines of the proposal put forward in clause 22 (a) of the English Draft Criminal Code Bill (1985):

"A person acts in respect of an element of an offence - "knowingly" when he is aware that it exists or is almost certain that it exists or will exist or occur."
(iii) Voluntarily.

The term voluntarily is defined in section 39 of the Malaysian Penal Code[108] thus:

"A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it."

An illustration appended to the section makes its meaning very clear:

"A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here A may not have intended to cause the death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily."

Section 26 of the Malaysian Penal Code defines "reason to believe" in these words:
"A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing but not otherwise."

An act done willingly without being influenced or compelled, as opposed to an act compelled, is called a voluntary act in everyday language. It is the opposite of an act done accidently or negligently. The Malaysian Penal Code however does not make a distinction between cases in which a man causes an effect deliberately (and with the intention of bringing that effect about) and cases in which he causes it knowingly or having reason to believe that he is likely to cause it. The term "voluntarily" is given an artificial meaning for the purposes of the Penal Code, a meaning that approximates to the English mens rea term, "wilfully". It covers mens rea in its widest sense, in that a person can be said to act "voluntarily" in any of the following situations:

(1) when he intends to cause a result;
(2) when he knows he is likely to cause a result;
(3) when he has reason to believe he is likely to cause a result.
In traditional common law these three "states of mind" correspond to intention, recklessness and negligence respectively. When the only mens rea required for an offence is that the accused acted "voluntarily" eg. section 339 [109] of the Penal Code, it is unnecessary to draw sharp distinctions between these different degrees of mens rea. However, many offences in the Penal Code restrict the wide scope of section 39. For instance, under section 321 [110] and section 322 [111] which define "voluntarily causing hurt" and "voluntarily causing grievous hurt", the words "reason to believe" have been omitted. Thus the requirement of "voluntariness" is qualified in that the accused must intend to cause hurt or know that he is likely to cause hurt. Without such subjective mens rea there can be no liability. It is,however, not clear why reasonable grounds of belief should be excluded in these cases. For purposes of section 321 and 322, the mere fact that he has reason to believe he is likely to cause hurt or grievous hurt is not sufficient mens rea.

(iv) Recklessness.

In English law "recklessness" used to bear a subjective meaning in the sense that the accused had himself to
realize that there was a chance of the harmful consequence occurring and the taking of the risk must have been unjustifiable in the circumstances.\textsuperscript{[112]} The House of Lords has now, however, reversed this and given a new meaning to the concept, "recklessness."

In \textit{R. v. Lawrence}\textsuperscript{[113]}, Lord Diplock was of the view that "an appropriate instruction.....on what is meant by driving recklessly would...........(involve) two things:

First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and second, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it......Whether the risk created by the manner in which the vehicle was being driven was both obvious and serious..... (depends on) the standard of the ordinary prudent motorist......"

A similar test (but without the qualification that the risk be "serious") was laid down by the House of Lords in
Commissioner of Police of the Metropolis v. Caldwell.\[114\] Further, in the case of Seymour,\[115\] the House of Lords ruled that this test applies to all crimes in English law that can be committed recklessly.

This new test is a radical departure from the old subjective test of recklessness. It is no longer necessary that the accused himself should have foreseen the possibility of the risk occurring. As long as the risk was "obvious" to the reasonable man the accused has acted recklessly.

In the case of Elliot v. C (A Minor)\[116\] a 14-year-old girl who was in a remedial class at school and had not slept an entire night was held to be reckless when she poured white spirit on the floor of a garden shed and threw lighted matches on the spirit. This was so despite the fact that the judges hearing the case at first instance had concluded that because of her age, understanding, lack of experience and exhaustion, she was not capable of appreciating the risks attached to her actions. This, however, was irrelevant: the risk would have been obvious to the reasonable prudent man and that was all that was involved in the Caldwell and Lawrence test of recklessness.
However, it is not quite accurate to say that all crimes requiring recklessness are treated objectively following the cases of *Caldwell* & *Lawrence*. In the case of *Spratt* [116a], the accused fired an air pistol from his flat into the square below. Two pellets struck a girl playing there. He said that he was aiming at a sign on a rubbish chute, that he did not know anyone was there and would not have fired if he had known. He pleaded guilty to assault occasioning actual bodily harm, an offence under S47, Offences Against Person Act 1861. He pleaded guilty on the ground of recklessness, that he had failed to give a thought to the possibility of actual bodily harm. He appealed against sentence but on appeal, there was a doubt as to the correctness of the plea. The appeal was adjourned to enable an appeal to be made against conviction. On the appeal against conviction, the court allowed the appeal, holding that D was not guilty of the offence under S47 unless he foresaw that he might occasion actual bodily harm.

The decision in the above case was approved in the case of *R v Parmenter*. [116b] It seems that in assault at common law and under the Offences Against the Person Act 1861, *Cunningham’s* subjective type recklessness continues to prevail.
(v) Rashly and Negligently

While each of these terms has a separate meaning, the Penal Code generally uses them jointly as in "causing death by a rash or negligent act" contrary to section 304 A.[117] The words "rashly" and "negligently" have been used in the definition of offences not to denote a positive evil intent, but to denote that want of care with which reasonable people are expected to act and the want of which is considered culpable.

"There are at least 11 sections in the Code dealing with the offences due to criminal negligence or rashness.[118] They all possess one feature in common, namely, that the act is not premeditated and done on purpose to produce the consequence. In all of them the act is rash, that is to say, an overhasty act done without due deliberation and caution. It produces a result which the offender never expected and which he may most regret. But he is punished not for the effect produced which he could not perhaps foresee, but for the manner of doing the act which was fraught with danger. The two terms "rash" and "negligent" are closely allied, but they are none the less distinguishable. In cases of negligence the party does not perform an act to which he is obliged; he breaks a positive duty, he does not advert to the act which it
is his duty to do. In rashness, the party does not act which he is bound to forbear; he breaks a negative duty. Here he adverts to the act but not to the consequences of the act he does. Both in rash as well as in negligent acts no thought is bestowed on the consequences. But in the one, there is the knowledge of the consequence, but there is overconfidence which makes one believe its happening unlikely. In the other, the consequence is never adverted to." [119]

The difference between culpable rashness and culpable negligence has been brought out very ably in this classic definition by Holloway J. [120]

"Culpable rashness is acting with the consciousness that mischevious and illegal consequences may follow, but with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischevious effects will follow, but in circumstances which show that the actor has not exercised the caution incumbent on him, and that, if he had, he would have had the consciousness. The imputability
arises from the neglect of the civil duty of circumspection ........"

Rashness thus involves advertance to the possibility of the consequence occurring. Negligence is inadvertance to such a possibility.

The distinction between the two terms is not of any great practical importance in the interpretation of the sections of the Code dealing with offences involving criminal negligence, for in all these sections the two words have been used together. Rash and negligent acts have been made penal only when they effect the safety of the public. It has been very well explained by Lord Esher thus:

"The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. If one man is near to another, a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property. For instance, if a man is driving along a road, it is his
duty not to do that which may injure another person whom he meets on the road, or his horse or his carriage."[121]

It may be remembered that:

"Simple lack of care such as will constitute civil liability is not enough; for purposes of criminal law there are degrees of negligence; and a very high degree of negligence is required before the felony is established."[122]

The expression "gross negligence" is not used in the Malaysian Penal Code. It only uses "negligence" and this can be found in numerous sections and the most important is section 304A of the Penal Code. This section provides:

"Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years, or with fine."

While in England the law has been settled in the case of Andrews [122a], in Malaysia the courts seem to have expressed different views. The attitude of the courts can
be traced through the cases, the first being the case of Lai Tin v P.P. [122b] In this case the judge, Murray-Aynsley J rejected the principle in Andrews and enunciated the principle that criminal and civil cases should be dealt with differently. He proposed the "intermediate" degree of negligence, where criminal liability can only be imposed upon a blameworthy conduct which deserves punishment by the state.

In the following year, in the Malaysian case of Cheow Keok v P.P [122c] the court applied the standard in the English law of manslaughter in interpreting section 304A Penal Code, thus overruling the earlier case of Lai Tin. The court opined that section 304A is a codification of the English common law offence of manslaughter by negligence, therefore it would be appropriate to follow the English authorities. The other reason given by the court for the decision is the standard of proof in criminal and civil cases are different. In the former it requires proving beyond reasonable doubt but in the latter it requires proving on the balance of probabilities. As such they should be treated differently from each other.

The decision in Cheow Keok is not free from criticisms. Firstly, section 304A carries a much lesser sentence than the English manslaughter, i.e. an imprisonment of up to
two years or with a fine. Therefore it cannot be that there must be prove of gross negligence for a less serious offence as in section 304A. Secondly, as a general rule of statutory interpretation, negligence ought to carry the same meaning throughout the Penal Code. Gross negligence could not be said to be required for other negligence offence in the Penal Code, for example in section 286, negligent handling of explosives or in section 269, negligent spreading of disease.

For the above reasons the decision in Cheow Keok was reviewed in the Singapore case of Woo Sing & Sim Ah Kow v R [122d]. In this case the court ruled that the Penal Code is not a codification of English law and that the English law of manslaughter has no relevance in interpreting section 304A which involves offence of much less gravity compared to the English manslaughter. Murray-Aynsley CJ added that it is not necessary to lay down a different standard of negligence in civil and criminal cases, although a higher standard of proof is required in the latter cases.

The most important Malaysian case on section 304A is Anthony Samy v PP [122e] where the judge conceded that he was bound by the decision in Cheow Keok but preferred the decision in Woo Sing. The reasons given by him are:-
1. The wordings in section 304A which reads "not amounting to culpable homicide" took section 304A out of the scope of culpable homicide, therefore it was a fallacy to equate section 304A with manslaughter.

2. "Negligence" must be given the same meaning throughout the Penal Code, as such it could only mean civil and not gross criminal negligence.

In the subsequent cases of Mah Kah Yew v P.P. [122f] and P.P v Adnan b. Khamis [122g] the courts affirmed that the decision in Woo Sing is the correct interpretation of section 304A.

(vi) Maliciously.

A thing is done maliciously, if it is done wickedly or in a depraved or perverse or malignant spirit, regardless of social duty and deliberately bent on mischief.[123] "Malice" has been defined by Russel to be any formed design of doing mischief. Stephen[124] calls it "a vague general term introduced into the law without much perception of its vagueness, and gradually reduced to a greater or lesser degree of certainty in reference to
particular offences by a series of judicial decisions." It means "a wrongful act done intentionally without just cause or excuse."[125] It does not mean in law, as it does in common parlance, any spite or ill will against a person.[126] All it means is an illegal act done perversely and to the knowledge of the accused. When applied to the doing of an illegal act, it means nothing more than that it was done wilfully or intentionally. The word "malice" is used in different senses in different branches of criminal law. For example, in relation to murder, it means intention to kill, while in libel, it means only an intention to publish; no express knowledge of the defamatory nature of the publication is implied.

The term "maliciously" itself appears in sections 219 and 220 of the Malaysian Penal Code. Being undefined, it is then permissible to look at English law where one discovers that the term bears a meaning significantly different from that attributed to it by Nigam.[127] Byrne J. considered the following principle which was propounded by the late Professor C.S. Kenny when deciding the case of R.v. Cunningham.[128]

"...in any statutory definition of a crime, "malice" must be taken not in the old vague sense of "wickedness"
in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill will towards the person injured."

Byrne J. was of the view that that was an accurate statement of the law. In his opinion, the word "maliciously" in a statutory crime postulates foresight of consequences.

The above analysis of these statutory mens rea provisions clearly reveals that the law in Malaysia has committed itself to the idea that certain species of mens rea must be proved for a certain kind of criminal offence. Criminal liability must therefore be based upon a premise of blame and this is best evidenced by a finding of one of the above mental elements.
(b) **Applicability of general doctrine of mens rea.**

Numerous statutory provisions do not expressly contain any specific provision for mens rea. Nowhere in the Penal Code or elsewhere is there any general provision endorsing the concept of mens rea. Does this mean that liability in all such cases must be "strict" in the sense that no mental element or other criterion of blameworthiness need be established?

Section 375 of the Penal Code for example makes no reference to any mental element.[129] What is the position of an accused who honestly believes that the woman is consenting to intercourse when in fact she is not? And what of the accused who honestly thinks the girl is over 14 years of age when in fact she is not? Must such an accused person be convicted on the basis that the doctrine of mens rea is inapplicable under the Penal Code? This indeed was (and is) the view of many commentators.

According to Ratanlal and Dhirajlal:

"The maxim actus non facit reum nisi mens sit rea has, however no application to the offences under the Code;
because the definitions of various offences contain expressly a proposition as to the state of mind of the accused. The definitions state whether the act must have been done "voluntarily", "knowingly", "dishonestly", or "fraudulently" or the like. Every ingredient of the offence is stated in the definitions. So mens rea will mean one thing or another according to the particular offence... If, in any case, the Indian legislature has omitted to prescribe a particular mental condition, the presumption is that the omission is intentional. In such a case the doctrine of mens rea is not applicable. [130]

Essentially two quite different approaches have been applied i.e. the "Chapter lV approach" (which very much confines itself to the Penal Code) and the "presumption of mens rea approach" (which goes beyond the Penal Code and draws on established common law principles)

(i) The Chapter lV approach.

The central argument here is that while the Penal Code does not contain a neat, single section incorporating a general doctrine of mens rea as, for instance in the Model Penal Code,[131] nevertheless its chapter of
general exceptions under Chapter IV achieves much the same effect.

According to Balasubrahmanyam,[132] "While the specific mens rea found in the definitions of particular offences gives effect to the doctrine in a positive way, the general exceptions in Chapter IV like mistake, accident, etc. emphasize, in a negative way, the same doctrine, i.e. that where there is no mens rea there can be no criminal liability. The general exceptions (based upon absence of mens rea) are but the enunciation of the doctrine of mens rea in a statutory form ......"

The two most important sections introducing mens rea "via the back door" in Chapter IV are sections 79 and 80.

Section 79

"Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be justified by law in doing it."

Section 80.

"Nothing is an offence which is done by accident or misfortune, and without any criminal intention or
knowledge, in the doing of a lawful act in a lawful manner, by lawful means and with proper care and caution."

Provisions such as these apply to every offence in the Penal Code or in other statutes irrespective of whether any mens rea term has been used in the definition of the statutory offence. Section 6 of the Penal Code for instance states that:

"Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions", though those exceptions are not repeated in such definition, penal provision or illustration."

In section 40 (2) it is provided that: "In Chapters 1V ......, the word "offence" denotes a thing punishable under this Code or under any other law for the time being in force."
It thus appears clear that the general exceptions, including sections 79 and 80, are applicable to every offence in Singapore and Malaysia whether it be a Penal Code offence or not. The effect of applying these general exceptions to offences such as rape is to introduce a mens rea requirement via the back door in that the accused who lacked the necessary mens rea could avail himself of such exceptions and thereby escape liability.

In the case of Abdullah v. R,[133] the appellant was charged with rape. It was clear at the trial that the offence, if committed, was only within the scope of section 376 by reason of the fact that the complainant was under 14 years of age. There was no doubt that the appellant had carnal knowledge of the complainant and that her age was under 14. The appellant contended that he thought she was over 16. This case turns on the construction of section 79 of the Penal Code. At the trial the learned Judge ruled that this belief, if it existed, was immaterial and refused to leave the matter to the consideration of the jury. He was convicted and appealed on this point of law.

According to Murray - Aynsley C.J., "There is no equivalent to section 79 in English law. This section
applies to all offences whether under the Penal Code or otherwise (section 40 Penal Code). It is clear that if the appellant believed "in good faith" that the complainant was over 16 it would be a case of mistake of fact. In this case what he did would not be an offence had the facts been as he supposed them to be; would he be "justified" by law? If on this supposition he would have committed some other offence, e.g., if he had thought the girl to be over 14 but under 16, he would clearly not have been justified by law. I think that if the act would have been a tort though not an offence, he would not have been "justified by law". On the other hand, in the present case, if his belief had been correct he would have committed neither a crime nor a tort. Is such an act always "justifiable by law"? In my opinion this is so. According to modern ideas, as embodied in the Penal Code, an act only acquires its criminal character by being forbidden by law. What the law does not forbid it allows, and what the law allows is I think justified by law. I do not think that it is possible to have an intermediate area that is not forbidden but not justifiable. I think that the question should have been left to the jury and I should order a new trial."[134]

The framers of the Penal Code have not only incorporated into the definition of each crime the mens rea required
for it, but further effect has been given to the doctrine of mens rea by providing in Chapter IV of the Code for general exemption from liability in certain circumstances which are inconsistent with the existence of a guilty mind.

Thus, even though the second clause of section 375 may be silent with respect to the mens rea requisite for the offence, where a man had sexual intercourse with a woman under the belief that she was consenting to the act while in fact she was not, he can set up the defence of mistake of fact within the ambit of section 79 of the Penal Code. A mistake of fact is a form of absence of mens rea and so excusable. The onus of proving the mistake as under section 79 is, however, on the accused.

In the case of *Public Prosecutor v. Teo Eng Chan*,[135] four accused drove a girl in a lorry to a deserted quarry and there each had sexual intercourse with her. The accused persons were all charged with rape punishable under section 376 of the Penal Code. Their defence was that the girl had consented, or if she had not, that they believed she had consented.
It was the view of Coomaraswamy J. that the law on consent and mistake of fact are contained in the Penal Code itself making it unnecessary to rely on the English decision of Morgan[136] where the House of Lords, by a majority of three to two, held that if an accused in fact believed that the woman had consented, he could not be found guilty of rape, whether or not that belief was based on reasonable grounds.

Coomaraswamy J. went on to consider whether there was a mistake of fact in the minds of the accused persons when they presumed that she consented. According to the learned Judge, "the law on this is contained in section 79 of the Penal Code which provides that "nothing is an offence which is done by any person.....who by reason of a mistake of fact....in good faith believes himself to be justified by law, in doing it."

The implications of this approach are extremely far-reaching and if consistently applied would mean that mens rea (admittedly introduced in this negative fashion) was a necessary ingredient of every crime in Malaysia and Singapore, unless the legislature expressly stated otherwise.
This approach would also mean that there could be no offences of strict liability in Malaysia and Singapore. The general defences could be pleaded in relation to every offence whether the offence be one under the Penal Code[137] or under any other law.[138]

(ii) Presumption of Mens rea approach.

Totally misunderstanding the scheme and structure of the Penal Code with regard to the mental element, courts both in India, and in Malaysia and Singapore have largely ignored the Penal Code in these matters and have instead turned to English law, and applied to the now well-established principle that in the absence of any express statutory provision there is a clear presumption that mens rea is implied. In certain circumstances this presumption may be rebutted[139] with the result that liability is strict. However, in all other cases, the general rule is that mens rea is required.

In a recent case of Public Prosecutor v. Zainal Abidin b. Ismail,[140] the four accused took a girl to the beach and there had sexual intercourse with her. They were charged with rape contrary to section 375 of the Penal
Code but claimed that she was consenting or that they believed she was consenting.

According to Roberts C.J., "In relation to ..... (the accused) I have to consider only whether the prosecution has satisfied me, so that I am sure, that these acts of intercourse took place in such circumstances as to constitute rape under section 375 of the Penal Code, i.e. did Miss X consent to what was done to her?

It is, I think appropriate at this point that I should refer to Morgan[141] which sets out the principles which have to be applied by a Judge when deciding the issue of consent on a charge of rape. The majority view of the House of Lords, which was subsequently overruled by the Sexual Offences Act 1967 [sic: Sexual Offences Act 1976], which does not apply in Brunei, was that the crime of rape consisted in having sexual intercourse with a woman, with intent to do so, without her consent or with indifference to whether or not she consented. The offence could not be committed if that essential intention was absent. Accordingly, if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape."[142]
It should be noted that there is no reference to the fact that section 376 specifies no mens rea terms; there is no reference to the fact that the accused persons were in fact claiming to have made a mistake and therefore Chapter IV of the Penal Code should have been applicable. The court simply turns to the English common law and applies it directly.

This approach has become extremely widespread. In the fifth edition of his work on criminal law, Gour wrote: "But no question of mens rea arises where the legislature has omitted to prescribe a particular mental condition as an ingredient of an offence because the presumption is that the omission is intentional".[143] He has now recanted, writing in his latest edition:

"Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea ......." [143a]
A statutory crime may or may not contain an express definition of the necessary state of mind. It may be silent as to any requirement of mens rea, and in such a case in order to determine whether or not mens rea is an essential element of the offence, it is necessary to look at the objects and terms of the statute. In some cases, the courts have concluded that despite the absence of express language the intention of the legislature was that mens rea was a necessary ingredient of the offence.

According to Stanley Yeo:

"It should be noted that these dicta merely state that English common law offences or defences cannot be invoked when there are express provisions covering the matter. However, this does not mean that principles derived from the common law cannot be considered for the purposes of construction. The courts would also have been prevented from such reliance on the common law had Macaulay, the principal draftsman among the Indian Commissioners who drafted the Indian Penal Code, had his way. Macaulay proposed that whenever an appellate court reversed a lower court on a point of law not previously determined or whenever two judges of a higher court disagreed on the interpretation of a provision of the Code, the matter should be referred to Parliament, which should decide on
the point and, if necessary, amend the Code. This proposal was not adopted in India, nor in Singapore or Malaysia, so that the courts of these jurisdictions have been given the task of determining the meaning to be given to an ambiguous provision. In such cases, the common law has occasionally been resorted to partly because the Indian Commissioners had themselves drawn some of their inspiration from English law and also because many of the judges and legal practitioners, at least prior to the independence of these nations from British rule, were most familiar with the criminal law of England.\[144\]

It was submitted by Stanley Yeo that "such reliance on common law principles is quite acceptable and reference may be made to section 5 of the Criminal Procedure Code as indicative of when these principles might be applied by local courts. This section provides for the English law relating to criminal procedure to be applied when there does not exist any special provision on the matter either in the Code or in any other existing local law. No such provision exists in the Penal Code. What is important to note, however, is the proviso to this section which states that English law is applicable in so far as it "does not conflict or is not inconsistent with [the] Code and can be made auxiliary thereto."
Similarly, in respect of the Penal Code, it is arguable that English law may be referred to for guidance in the construction of a particular section provided that the law is not inconsistent with the wording of the section and the spirit of the subject matter involved.

This suggestion of how aspects of the common law might be considered under the Code accords with general principles of statutory interpretation. The basic rule is that the essence of a code is to be exhaustive on the matters in respect of which it declares the law and the courts cannot disregard or go outside the letter of the enactment according to its true construction. Hence the courts are to examine the words in the first instance, and where the words are plain, they are to decide the case accordingly. There is a secondary rule of statutory interpretation which governs instances when the words of a provision allow for two constructions. In such cases the courts should not adopt that construction which would lead to an absurdity, but should adopt that construction which appears to be most in accord with reason and convenience, having regard to the subject matter in question. Common law principles may assist in the application of this rule of interpretation, provided always that those principles are generally consistent with the statutory provisions concerned."[145]
On the other hand, many commentators have roundly condemned this whole approach. For instance, Balasubrahmanyam states:

"Applying the common law doctrine of mens rea as an interpretative principle while dealing with offences under the Penal Code, and relying on English authorities for that purpose, really means that the scheme of the Code in regard to the mental element in criminal responsibility is not properly appreciated ....... The general exceptions (based upon absence of mens rea) are but the enunciation of the doctrine of mens rea in a statutory form and there can be no justification for deriving inspiration from English law ....... It is a tragedy that some times the Indian Penal Code is called upon to bear the oppressive weight of English case law."[146]

These views were accepted and there was an emphatic rejection of this whole "presumption of mens rea" approach in the most recent Singapore decision on the subject.[147] Coomaraswamy J. who decided the case states that:

"The defence of each accused ...... was that ...... each had reason to believe that she consented (to
intercourse). For this, reliance was placed on the English case of Morgan[148] where the House of Lords, by a majority of three to two, held that if an accused in fact believed that the woman had consented, he could not be found guilty of rape, whether or not that belief was based on reasonable grounds. Counsel placed heavy reliance on the decision of the learned Chief Justice, Dato Sir Denys Roberts, sitting as a trial judge in Brunei Darussalam in the case of Zainal Abidin b. Ismail.[149] The Chief Justice applied the Morgan principle in this case of rape against the accused. Counsel before me relied upon the case of Zainal Abidin because the Penal Code of Brunei is, with differences immaterial for present purposes of ours. Section 375 is identical in the two Penal Codes. They therefore argued that I should follow the decision in Zainal Abidin.

In my view, the law on consent and mistake of fact are contained in the Penal Code itself under Chapter IV dealing with exceptions,......... In view of these specific provisions in our law, the majority decision of the House of Lords in Morgan does not, in my humble view, have any application in Singapore. There is also nothing in the transcript of Dato Sir Denys Roberts' decision in Zainal Abidin's case that he was referred to the
provisions of the Penal Code to which I have just referred and will hereafter refer."

This is an important decision and one that spells the end for the "presumption of mens rea" approach. It is predicted that this Chapter 1V approach is the one that will be used in Malaysia and Singapore in the future. However, this approach leaves open a major question. Coomaraswamy J. completely overlooked the leading Privy Council decision, Lim Chin Aik,[150] which was binding on him.

(iii) Meaning of "mens rea"

One final problem remains for consideration. Bearing in mind that there are many different types or degrees of mens rea, which of these various forms is to be adopted when a statutory provision does not specify any particular species of mens rea? For example, since section 375 of the Penal Code is silent as to the mens rea requirement for rape, what mens rea is then required for this offence?
First, if one adopts the view that Chapter IV of the Penal Code involves mens rea, it becomes clear that the meaning of mens rea must be found in Chapter IV itself.

According to M.V. Sankaran,[151] "Taking into consideration the first ingredient of section 79 insofar as it pertains to our inquiry, that is, in a case of rape as under the second clause of section 375, any question whether the woman consented to the intercourse or not would be a question of fact. Therefore, any mistaken belief on the part of the accused as to the consent of the woman would be a mistake of fact and not a mistake of law.

Taking into consideration the second ingredient of section 79, the term "good faith" is defined under section 52 of the Code as follows: "Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention,"

The Law Commissioners who drafted the Indian Penal Code state:
"To satisfy the court of his good faith, a person must show at least that he acted advisedly and that he had reasonable ground prima facie for believing that he ought to do what he did."

According to Webster's Third New International Dictionary, "due care" means: "The care that an ordinarily reasonable and prudent person exercises under all circumstances for his own protection."

The same dictionary explains "attention" to mean, "the application of the mind to any object of sense or thought" or simply, "observant care"........

Taking into consideration the third ingredient under section 79, we find that the accused's act must be justifiable in law under the state of things as supposed by him. The question then arises: "What is justified by law?" The Code does not define this term. The Law Commissioners who drafted the Indian Penal Code state:

"Under both (sections 76 and 79) there must be a bona fide intention to advance the Law, manifested by the circumstances attending the act which is the subject of
the charge; and the party accused cannot allege generally that he had a good motive, but must allege specifically that he believed in good faith, that he was bound by law (section 76) to do as he did, or that being empowered by law (section 79) to act in the matter, he had acted to the best of his judgement exerted in good faith."

The Law Commissioners thus equate the expression, "justified by law" with that which is "empowered by law". This does not seem clear enough as again the question may be raised: "What is empowered by law"? It seems safer to say that an act which is not "illegal" within the meaning of section 43 of the Code would be an act "justified by law" .......

Sankaran concluded by saying that "the House of Lords has held in the Morgan case that an honest but mistaken belief entertained by the accused that the woman was consenting to sexual intercourse, would preclude the mens rea required in rape and hence negative the charge of rape itself ....... The court held that reasonableness of the mistaken belief is irrelevant except as a matter of evidence to show that the accused genuinely held that belief. The court also held that recklessness as to the woman's consent would form part of the mens rea in rape.
The decision is obviously sound because if mens rea is a subjective element according to modern notions, then the absence of mens rea should equally be subjective.

However, the Morgan case cannot be followed by our courts, until a statutory change is made in this regard. Section 375 of the Indian Penal Code dealing with rape on the whole leaves the mens rea to be presumed from the circumstances described therein. The defence of mistake of fact as under section 79 of the Code is circumscribed by the term, "good faith", which is not equivalent to an "honest belief" as under the General Clauses Act 1897, whether negligent or not. However "honestly" a mistaken belief is held by the accused, if it fails the test of "due care and caution" as under section 52 of the Code, the defence of mistake would fail. This requirement of due diligence does bring in an objective element into the plea of the "absence of mens rea" based on mistake of fact."[152]

The meaning of mens rea becomes quite different if one adopts the second solution discussed above, namely, the "presumption of mens rea" approach. Under this approach one is not introducing mens rea "via the back door" by using section 79 and therefore there is no limitation that the accused have acted "in good faith" as defined by section 52. Mens rea is being implied positively in
accordance with the English common law and accordingly must bear such meaning as would be ascribed by the common law. Continuing with the rape example of section 375, this would mean that the mens rea of rape is that as defined by the leading English decision, Morgan. According to this the accused must believe that the woman was not consenting or must at least have realised that there was a chance that she was not consenting (i.e. subjective recklessness under English law). If he honestly thought that she was consenting then he lacks the mens rea necessary for rape. Under Morgan, the reasonableness or otherwise of the belief is irrelevant.

It is important to note that in cases of Caldwell [152a] and Lawrence [152b] there had been a shift from subjective recklessness to objective recklessness. However, since recklessness is discussed above in relation to the offence of rape rather than any other offence, therefore, Morgan would be more appropriate. Furthermore it was held in the case of R v Satnam [152c] and R v Kewal [152d] that any direction as to the definition of rape should be based upon section 1 of the Sexual Offences (Amendment) Act 1976 and upon DPP v Morgan, without regard to Caldwell and Lawrence, which were concerned with recklessness in a different context and under a different statute. The word "reckless" in relation to rape involves a different concept to its use.
in relation to malicious damage or in relation to offences against the person.

Further, because mens rea is being positively implied, the burden of proving such mens rea is on the prosecution throughout. This of course is a burden that has to be discharged beyond all reasonable doubt.

This was the approach adopted in Zainal Abidin b.\[153\] Ismail. The common law meaning of mens rea for the crime of rape was simply transposed to section 375 of the Penal Code. Had the court confined its analysis within the four corners of the Penal Code, it would have reached the different result that the accused's belief would have to be "in good faith".

It is quite clear that the courts in Malaysia and Singapore have come to a cross-road in interpreting statutory provisions which are silent as to the requirement of mens rea. The first approach being, where the provision is silent as to mens rea then no mental element is required, in other words liability is strict. This has indeed been the view of some Indian writers. Ratanlal and Dhirajlal for example stated:-
"If, in any case, the Indian legislature has omitted to prescribe a particular mental condition, the presumption is that the omission is intentional. In such a case the doctrine of mens rea is not applicable." [153a]

The second approach and the one adopted in Zainal Abidin's case, which followed Morgan, completely ignores the Penal Code and relied instead on the principles of English Law. In the absence of any express mens rea term in the statutory provision, there is a clear presumption of mens rea. This has been adopted in the case of Lim Chin Aik.

The third approach is one that attempts to give effects to the structure of the Penal Code instead of slavishly adhering to the principles of English law. This is the approach taken in Teo Eng Chan. [154] According to this approach eventhough mental element is not positively effected in that, if the accused could show that he had no mens rea then he commits no offence. The lack of mens rea on his part could be due to mistake thinking in good faith that the complainant had consented. Thus he would have a defence under section 79 of the Penal Code.

It now seems more likely that courts will follow Teo Eng Chan and insist on the Chapter IV approach. Under this approach it will be far easier to secure convictions for
two reasons. First, only a lesser degree of blameworthiness need be established, namely, that the accused acted without "due care and attention" and second, the prosecution has no evidential burden to discharge here, the burden being on the accused to establish on a balance of probabilities that he was acting with the requisite "due care and attention".
NOTES

1. F.M.S. Cap. 45.


2a. See Lord Tenterden (as he afterwards became) in Thistlewood (1820) 33 St. Tr. 681.


4. Ibid.

5. Turner in Russel on Crime, p.27.


7. Section 351, Penal Code.

8. "Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparation amount to an assault."

9. Section 300, Penal Code.

10. Section 191, Penal Code.


21. Ibid.

22. supra p.21


According to Henderson and Gillespie:

"A somnambulism is a general automatism occurring in the course of, and interrupting, normal sleep. In this condition the patient rises from sleep, disregards the ordinary significance of his environment and those in it, and behaves as if he were living in an environment conjured up by himself. If spoken to, not brusquely he may reply in terms of the phantasy which he is enacting. If roughly stimulated, he may regain full consciousness, or pass into a trance state of immobility, muscular flaccidity and total lack of response of any kind. Patients in somnambulic states have sometimes met with unfortunate accidents, eg. scalding, or even death from drowning.

During the somnambulism the patient commonly lives through a vivid experience, little or not at all related to his surroundings, and therefore hallucinatory in character. By talking to him, not insistently, but in a persuasive attempt to enter into his experience, the patient may be got to describe the nature of the experience while he is still in the somnambulistic state. Although such patients appear to be "walking in their sleep they are not really asleep. Their perceptions are often acute."


R. A. A. McCall Smith and D. Sheldon, Scots Criminal Law, p. 21.

(1878) 4 Couper 70.


(1990) 56 CCC 3d 449.


42. at page 922-3.

43. [1983] 1 WLR 760.

44. G. Williams, Textbook of Criminal Law, p.629.

45. (1971) 3 CCC(2d) 84.

46. (1975) 22 CCC 415.


48. at p. 435.


51. Ibid.

52. Section 84 Penal Code reads:

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

53. (1956) 22 MLJ 36 (CA, Malaya)


55. Section 80 reads:

"Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution."

56. op.cit. p.149.

57. Cogdon

58. Penal Code (F.M.S. Cap. 45)

59. Section 32 Penal Code.

60. Glanville Williams, Textbook of Criminal Law, at p.148-149.

61. McCall Smith and Sheldon, Scots Criminal Law, at p. 26

63. (1968) Cri. L.J. 405 (Calcutta H.C. India).
64. (1961) S.C. 1782 (S.C. India).
68. (1902) 19 TLR 37 (Taunton Assizes, England).
69. [1893] 1 Q.B. 450.
75. (1972) SCC (Cri) 254.
76. "The social responsibility view of omissions liability grows out of a communitarian social philosophy which stresses the necessary interrelationship between individual behaviour and collective goods. Individuals need others, or the actions of others, for a wide variety of tasks which assist each one of us to maximise the pursuit of our personal goals. A community or society may be regarded as a network of
relationships which support one another by direct and indirect means. But the community also consists of individuals, each having certain basic rights (such as the right to life). It is therefore strongly arguable that each individual life should be valued both intrinsically and for its contribution (or potential contribution) to the community. It follows that there is a good case for encouraging co-operation at the minimal level of the duty to assist persons in peril, so long as the assistance does not endanger the person rendering it, and a case may be made for reinforcing this duty by the criminal sanction."


79. A. Ashworth, op.cit. p.425.


81. at p. 88-89.

82. Macaulay and the other Indian Law Commissioners, A Penal Code Prepared by the Indian Law Commissioners, Note M 53 - 56 (1837).

83. 4 Comm. 21.

84. 52, Law Quarterly Review, 60.

Section 142 reads "Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly."


Salmond, Jurisprudence, p. 523.

K. Moideen, 1959 Ker. 146.


F.M.S. Cap 45.

Section 300 (a) Penal Code reads: "Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death.

Section 300 (d) Penal Code reads: "Except in the cases hereinafter excepted, culpable homicide is murder if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."
98. ibid.

99. ibid.

100. See for example, sections 23 and 24 of the Penal Code.

101. F.M.S. Cap. 45.


103. F.M.S. Cap. 45.

103a. Locke, as quoted in R.C. Nigam, op.cit., p.77.

104. op. cit. p.77.

105. Section 411 Penal Code reads:
"Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."


107. Supra note 97.

108. F.M.S. Cap. 45.

109. Section 339 reads:
"Whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.".
110. Section 321 reads:
"Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt."

111. Section 322 reads:
"Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."


117. Section 304 A reads:
"Whoever causes the death of any person, by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years ......."


120. In re Nidamarti Nagabhushanam (1872) 7 Mad. H.C.R.
121. **In Le Neve v. Gould** (1893) 1 W.B. 491, 497.


122a. Ibid.

122b. [1939] MLJ 248

122c. [1940] MLJ 30

122d. (1954) 20 MLJ 200

122e. (1956) 22 MLJ 247

122f. [1971] MLJ 1

122g. [1972] MLJ 274


125. Millar, Handbook of Criminal Law, p. 69.

126. Holmes, Common Law, p. 52.

127. Supra. note 69.


129. Section 375 reads:
"A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

(a) against her will;
(b) without her consent;
(c) with her consent, when her consent has been obtained by putting her in fear of death or hurt;
(d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
(e) with or without her consent, when she is under fourteen years of age.


131. For example, S. 2.02 of the Model Penal Code in the USA provides that "a person is not guilty of an offence unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offence."


134. at p.197.


137. Section 6 Penal Code.

138. Section 40 (2) Penal Code.

139. See infra p.175, 176.


142. ibid.


145. ibid.


152. ibid.
152a. [1982] AC 341

152b [1982] AC 510

152c (1983) 78 Cr App. Rep 149

152d. (1983) 78 Cr App. Rep 149


CHAPTER 3: THE CONCEPT OF STRICT LIABILITY.

A. Introduction.

The proliferation of so-called "strict liability" offences in the criminal law has occasioned the vociferous, continued, and almost unanimous criticism of analysts and philosophers of the law. Liability is strict because the prosecution is relieved of the necessity of proving mens rea. While the practice of imposing such liability for torts has been enthusiastically welcomed as an acceptable method of loss distribution and minimization, the corresponding elimination of moral responsibility as an element of certain criminal offences has been received with widespread juridical disparagement. Jerome Hall has condemned strict criminal liability as incompatible with any civilized, rational and moral system of Penal law.[1] He was perhaps the most active and insistent critic of such offences, and has consistently denounced the notion of strict liability as anthema to the coherent development of a rational criminal law. According to him: "It is impossible to defend strict liability in terms of or by reference to the only criteria that are available to evaluate the influence of legal controls on
human behaviour. What then remains but the myth that through devious, unknown ways some good results from strict liability in 'penal' law." [2]

Packer has noted that:

"Few today cavil at strict liability in tort.... But the transfer of money from one pocket to another is one thing, and the judgement of community condemnation expressed in criminal conviction is quite another. So long as that sanction is resorted to, moral blameworthiness should be the indisputable condition precedent to its application. Whether it is a sufficient condition is a question that needs more thought, but that it is a necessary condition cannot seriously be doubted."[3]

Thus the imposition of severe criminal sanctions in the absence of any requisite mental element has been held by many to be incompatible with the basic requirements of Anglo-American, and, indeed, any civilised jurisprudence. The framers of the Model Penal Code for example have proclaimed "a frontal attack on absolute or strict liability......whenever the offence carries a possibility of sentence of imprisonment."[4]
Modern crimes of strict liability are almost always statutory in origin.[5] It is debatable however, in many cases whether the parliament of England and Malaysia intended to create crimes of strict liability. The omission of the requirement of mens rea may be deliberate, or it may on the other hand be an oversight. Statutes said to create crimes of strict liability are usually ambiguous, and the justifications for imposing strict liability are thus to be found in principles of interpretation based on the consideration of public policy.

In determining whether a statutory provision does or does not impose strict liability, the following considerations are relevant:[6]

(1) The language of the provision creating the offence, and in particular any expression indicating that some mental element is required,[7] although the absence of any such expression does not give rise to a compelling inference that mens rea is excluded.[8]

(2) Whether the act is criminal in the generally accepted sense or is an act, which in the public interest is prohibited under a penalty.[9]
(3) The nature of the mischief at which the provision is aimed and whether the imposition of strict liability will tend to suppress that mischief,[10] although strict liability will not be inferred simply because the offence may be described as a grave social evil.[11]

It is not unusual to find strict liability imposed by legislation in relation to offences which are not criminal in any real sense. This is the case with matters such as the sale of food and drugs, the supply of intoxicating liquor, the safety of those employed in factories, the control of weight and measures and the less serious road traffic offences. "Justice", the British section of the International Commission of Jurists, has estimated that, of the 7,200 separate offences listed in Stone's Justice Manual for 1975, over half did not require proof of a mental element.[12] The existence of crimes of strict liability constitutes an important and wide ranging exception to the general principle that an accused ought not to be convicted of an offence where his conduct did not involve an element of moral culpability.
Francis B. Sayre, in his classic article on Public Welfare Offences, contends that since the real menace to society is the intentional commission of undesirable acts, evil intent must remain an element of the criminal law. According to him, "to inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement."[13]

B. Meaning of Strict Liability

Neither the justifications for imposition of strict criminal liability nor the arguments against such imposition can intelligently be evaluated until the meaning of the phrase "strict criminal liability" has been clarified.

An offence of strict liability is one where an element of mens rea is dispensed with. With crimes of strict liability an accused can be convicted even though he had no mens rea and was not blameworthy in any other way. Osborn's Concise Law Dictionary defines strict liability
as liability without fault i.e. where a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongly intent or negligence.[14] Williams says that an offence is one of strict liability if mens rea (guilty mind) is not necessary for a conviction, or alternatively if liability may be established on proof of the actus reus alone.[15] Thus in most cases of strict liability even ignorance or mistake of fact will not be admitted as defences. In other words what the law prohibits may be done unintentionally; and yet there is liability. Apparently, then, there is liability without moral culpability.

Another possible approach in determining the meaning of the phrase strict liability is that of ostensive definition. That is to say by making a brief description of a small, but representative sample of the kinds of offences which are usually known as strict liability. This is done so as to make the common characteristics of this class of offences relatively obvious upon inspection.

The case of Regina v. Prince,[16] is famous in both English and American jurisprudence. Prince, was indicted under a statute which made it a misdemeanour to
"unlawfully take....any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father and mother...."[17] One of the defences which Prince sought to interpose rested upon the reasonableness of a belief that the girl in question was over sixteen years old. The majority of the Court interpreted the statute to make the reasonableness of a belief as to the girl's age irrelevant, and found Prince guilty.

In United States v. Balint,[18] the landmark case in American jurisprudence, the defendant was indicted under a statute which made it unlawful to sell narcotics without a written order. The defendant claimed that the indictment was insufficient because it failed to allege that he had known that the drugs sold were narcotics. The United States Supreme Court held that his conviction did not deny due process.

Another classic example is State v. Linberg.[19] The statute in question provided that "every director and officer of any bank....who shall borrow.....any of its funds in an excessive amount.....shall......be guilty of a felony."[20] The defendant contended that he had borrowed the money in question only after he had been
assured by another official of the bank that the money had come from a bank other than his own. The court, however, held that the reasonableness of the defendants mistake was not a defence.

A striking recent example of strict liability can be seen in the English House of Lords decision of Pharmaceutical Society of Great Britain v. Storkwain Ltd. The appellants, retail chemists, supplied prescription-only drugs in accordance with a forged prescription. They were convicted of an offence contrary to section 58(2) of the Medicines Act 1968 which provides that "(a) no person shall sell by retail....a medical product (defined)....except in accordance with a prescription given by an appropriate practitioner...." It was accepted that the appellants were in no way to blame. However, the offence was construed to be one of strict liability and criminal liability accordingly ensued despite a complete absence of mens rea.

The House of Lords in holding section 58(2) of the Medicines Act 1968 to be an offence of strict liability was clearly influenced by the fact that this was a "public welfare offence" in the sense that pharmacists were in a position to put illicit drugs on the market and
the public have no means of protecting themselves. Strict liability was therefore necessary to make pharmacists extra careful.

Assuming these cases to be representative,[22] strict liability offences might be tentatively described as those in which the sole question put to the jury is whether the jury believes the defendant to have committed the act proscribed by the statute.[23] If it finds that he did the act, then it is obliged to bring in a verdict of guilty. In other words, the prosecution can secure a conviction without proving that the accused acted intentionally, recklessly or even negligently in respect of some or all elements of the actus reus.

C. Strict Liability v. Absolute Liability.

Absolute liability and absolute prohibition are often used to convey the same meaning as strict liability, though the two former expressions suggest disregard for more than just mens rea and should therefore be taken as capable of a wider meaning than the latter.[24] An offence of absolute liability would be one where no
statutory provision to the contrary, if an offence is truly criminal the prosecution must prove the mens rea which is expressly or presumptively required, and D is entitled to acquittal if there is a reasonable doubt on this issue. But if it is a regulatory offence and the terms of the legislation do not make mens rea or fault an essential element of it, the prosecution need only prove that D committed the prohibited act, or was responsible for the actus reus (although he must prove this beyond reasonable doubt), and D has the burden of proving the defence of absence of fault on the balance of probabilities. In Canada this rule was established by the Supreme Court in Sault Ste. Marie\textsuperscript{[84]} and, although it had previously accepted that the persuasive burden did not shift to D in relation to either truly criminal or regulatory offences\textsuperscript{[85]}, in Civil Aviation Department v. MacKenzie\textsuperscript{[86]}, the New Zealand Court of Appeal adopted the Canadian rule. In these cases Woolmington is held to be concerned only with truly criminal offences and the reversal of the burden of proof is justified on the basis that D will usually know far better than the prosecution how the breach occurred and what had been done to avoid it.

ENGLAND

There has also been a dramatic move away from strict criminal liability in the common law of England as in
Canada, Australia and New Zealand. A good example can be seen in the case of *R v. Phekoo* [87]. In this case, the defendant who was an owner of a house, believed that two men who were in the house were squatters and had no right to be there. The owner threatened the squatters with a beating or death if they did not leave.[88] Unknown to him, however, the squatters had sublet the premises from a former tenant, who had not informed the owner of the house of the sublet.[89] To the defendant's argument that his lack of knowledge as to their legal status was a defence, the trial court responded that the statute imposed strict liability, assuming that his actions could be considered as "calculated to interfere with the peace or comfort of the residential occupier."[90] Because the defendant's threats no doubt had this effect, the defendant was convicted. On appeal, the Court of Appeal reversed, requiring a showing of knowledge because conviction would impose both stigma and potentially severe punishment (the statute provided a possible two year prison term).[91]. The Court quoted Lord Diplock's opinion in a related matter, in which he said that "the climate of both Parliamentary and judicial opinion has been growing less favourable to the recognition of absolute offences over the last few decades...[92] The Court found a halfway station, however, declaring in
Seven years later, Raja Azlan Shah J. as he then was, in the case of *K.S. Roberts v. Public Prosecutor*[^30] stated that:

"In a case under section 292(a) of the Penal Code, knowledge that the publication is obscene need not be proved. If the law is otherwise, it would place an intolerable burden on the prosecution. The difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the publication has made the liability strict. Absence of knowledge may only be taken in mitigation of sentence."

In the case of *Gammon Ltd. v. A.G. of Hong Kong*,[^31] builders were charged with an offence of diverging or deviating in a material way from any work shown in a plan approved by the building authority. When the building was constructed part of the lateral support system, required by the plans, was removed. The Privy Council ruled that the offence did involve an element of *mens rea*, namely, there had to be knowledge of the approved plan and of the fact of deviation, but the offence could be regarded as one of strict liability because no knowledge of the materiality of the deviation was necessary. Again, dispensing with *mens rea* in relation to one element of the *actus reus* (the materiality of the
deviation) rendered the offence one of strict liability. Had it been an offence of absolute liability, no *mens rea* in relation to any of the actus reus elements would have been necessary.

The problem is how to draw a distinction between those offences which do and those offences which do not require *mens rea*. Sayre is of the view that it does not depend on whether the crime happens to be a common law or statutory offence; this contrasts with the suggestion made by some courts that the line depends upon the distinction between *mala in se* and *mala prohibita*. Gordon regards criminal law as being divisible into two sections; one dealing with "true" crimes like murder, robbery and rape, while the other is concerned with what are commonly called public welfare offences. According to him, the latter are offences created by statute and designed, not directly to preserve life or property or even public order, but to ensure, for example, that only clean food will be sold to the public, or that there will be an equal distribution of certain commodities in times of scarcity. He goes on to say that the "true" crime is thought of as something evil in itself - *malum in se*, while the public welfare offences are thought of not as evil or immoral, but as being at best only technical crimes, punishable because they are forbidden by statute - *mala prohibita.*[32]
Sayre view this division as unsound because there are many offences which though held not to require proof of mens rea yet, are highly immoral, while many requiring it are not inherently immoral at all. He said that to settle the problem of distinguishing offences which do and those which do not require mens rea in the absence of statutory direction depends upon:

(a) the character of the offence, and
(b) the nature of the penalty involved in its violation.

"In general, offences not requiring mens rea are the minor violations of laws regulating the sale of intoxicating liquor, impure or adulterated food, milk, drugs or narcotics, criminal nuisances, violations of traffic or motor vehicle regulations, or of general police regulations passed for the safety, health, or well being of the community and not in general involving moral delinquency."[33]

D. Historical Background.

The development of most strict liability offences dates from the nineteenth century. In the aftermath of the industrial revolution a great deal of regulatory
legislation was enacted dealing with the new areas of public health, safety and welfare. The trend increased in the twentieth century as an increasingly complex society demanded social regulation. Legislation dealing with traffic regulation, consumer protection, control of impure food and drugs, protection of the environment and so on was steadily passed. That new development comes into evidence with the decision of Regina v. Woodrow [34]

The defendant in Woodrow was a tobacconist in Great Yarmouth. An excise officer seizes his tobacco, having found that it was "adulterated" with sugar, molasses, and other saccharine matter, which constituted one seventh of the total weight. The Court of Exchequer held the respondent liable even though he proved that he had purchased the tobacco as genuine, and "had no knowledge or cause to suspect" that it was not so. Baron Parke said, when deciding the case:

"It is very true that it may produce mischief because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so."[35]
Intriguingly, although the court took a harsh position on the issue of respondent's guilt, the court agreed with the Quarter Sessions Court that a mitigated penalty was proper, [36] notwithstanding the fact that the statute mandated a larger fine. Thus, "at the very beginning," courts found ways to avoid placing the full brunt of strict liability on the defendant.

Much of this developing regulation could have been placed under administrative control without involving the criminal law. For instance, local authorities could have been given powers to close down or in some other way to restrict the operations of companies causing polluted matter to enter rivers. But instead of adopting such an approach, it was felt that the criminal law would be the most effective instrument for enforcing such regulations. Sayre discussed the significance of the new development and described its emergence as a product of two related causes:

"(1) the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to the protection of public and social interests and

(2) the growing utilization of the criminal law machinery to enforce, not only the true crimes of the classic law,
but a also a new type of twentieth century regulatory measure involving no moral delinquency." [37]

It was felt that invocation of the criminal sanction would best stimulate the required diligence and cause persons engaged in such activities to police their enterprises to ensure compliance with the law. Criminal law has also been one of the traditional mechanisms of social control and prevention of these activities which do cause real and serious harms.

The question still remains though, why were the traditional principles of the criminal law not incorporated into such regulatory offences? Why was the requirement of blame or fault dispensed with? The true reason relates to the problems of law enforcement. Proof of blame could have undermined the efficacy of the law. Take, for instance, offences relating to the sale of impure or adulterated food or drugs. Advances in chemical analysis meant that adulteration become easier to detect but the huge increase in the standard of products, and the increased complexity of their component ingredients made it extremely difficult to prove that a manufacturer or merchant knew that the goods did not conform to standards.[38] If mens rea needed to be proved, the law would become a dead letter.
While these practical considerations of enforcement were the real reason for the proliferation of strict liability offences, other justifications were soon added. Strict liability would promote increased care and efficiency. Knowledge of strict liability is a cost to be weighed when setting up a trade or business. It will for example, encourage enterprises to appoint experts, say chemists or bacteriologists, to ensure that their products are safe. It was felt that it was preferable to place the burden on such enterprises who would be in a position to prevent the harm than on the innocent public.

Another line of justification is that no injustice is caused as strict liability offences are not "real crimes". They are only quasi criminal offences. Conviction does not entail the same stigma as for real crimes. The penalties are usually slight. Prosecutorial discretion usually insists upon prosecution only of those who are in some way to blame. In other cases, should the truly blameless be prosecuted and convicted, a minimal sentence such as an absolute discharge would be appropriate.[39]

Thus, there has grown up within comparatively recent times a group of public welfare offences. The offences
not requiring \textit{mens rea} fall roughly within the following groups:

(1) Illegal sales of intoxicating liquor
   (a) sales of prohibited beverage;
   (b) sales to minors;
   (c) sales to habitual drunkards;
   (d) sales by methods prohibited by law.
(2) Sales of impure or adulterated food or drugs.
(3) Sales of misbranded articles.
(4) Violations of anti-narcotic acts.
(5) Criminal nuisance.
(6) Violations of traffic regulations.
(7) Violations of motor vehicle laws.
(8) Violations of general police regulations, passed for the safety, health or well being of the community.[40]

According to Sayre, the reason for this growth of public welfare offences lies in the existence of a compromise between two fundamentally conflicting interests,— that of the public which demands restraint of all who injure or menace the social well being and that of the individual which demands maximum liberty and freedom from interference. He traces the history of the criminal law which shows a constant swinging of the pendulum so as to
favour now the one, now the other, of these opposing interests. According to him, during the nineteenth century, the individual interest held the stage; the criminal law machinery was overburdened with innumerable checks to prevent possible injustice to individual defendants. The scales were weighted in favour of the defendant so much so that the public welfare often suffered. In the twentieth century, the idea is more of the protection of social and public interests. He further says that as a coincidence, during this period of time, modern criminologists are teaching that the objective underlying correctional treatment should change from the barren aim of punishing human beings to the fruitful one of protecting social interests. As a direct result of this new emphasis upon public and social, as contrasted with individual interests, courts have naturally tended to concentrate more upon the injurious conduct of the defendant than upon the problem of his individual guilt.[41]

Thus the creation of strict liability offences confers a "Robin Hood" image on the state in that the state appears to assume a paternalistic role and protects the weak against the strong and for that reason alone will prove to be popular and lasting despite criticism. That image will come to be accentuated particularly in new areas
such as economic crimes and environmental protection. The presentation of statutory offences as proceeding from a paternalistic concern of the state to protect the weak from the strong will give it enough political strength to withstand the liberal criticism that the aim of such social protection is achieved at the cost of convicting the innocent: Strict liability offences protect the consumer from the manufacturer and the large chain stores, the young from international drug syndicates, society from conglomerate corporations which create environmental hazards, the small investor from the predators in the stock markets and the innocent passer-by from hazards created by careless contractors at building sites. The popular appeal of strict liability ensures the continued life of the policies on which it is based.[42]

E. Strict Liability and the Penal Code

In English law, the doctrine of mens rea is the progeny of the courts. It has been developed through judicial interpretation over the centuries, and does not derive its validity from any statutory instrument. All offences evolved by the common law contain both a physical and
mental element. Mens rea, in some form, is a basic requirement of criminal guilt in respect of common law offences.

In recent times, however, a great variety of offences unknown to the common law has been created by statute. These "statutory offences", as they are generally described, pose a problem in regard to mens rea. No difficulty arises in the context of those statutory offences which specifically include a mental element in their definition. The vexed question is whether in cases where the statutory definition of the offence makes no reference to any mental element, the offence is constituted without proof of any form of mens rea, or whether the statutory definition is to be read in the light of the common law doctrine. In the event of the former construction being adopted, the offence may be identified as one of strict liability.

Two incompatible methods of approach to this problem have been adopted by the English courts. One is based on the presumption in favour of retention of mens rea. This approach is inclined to consider mens rea a constituent element of the offence, and shows reluctance to jettison this element in the absence of clear words to the
contrary. This attitude, inspired by common law traditions, has received articulation in several judgements. Lord Goddard C.J. in *Brend v. Wood* [43] has stated:

"It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[44]

With respect to the requirement of mental element of crime, the position was stated with even greater force by Bishop:

"There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness. Neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is for every other, that the essence of an offence is the wrongful intent, without which it cannot exist."[45]
In the past century, however, opposed to this mode of construction is the literal approach. Under this approach, the statutory definition of the offence is construed strictly in terms of its letter, without having recourse to any doctrine of the common law. Representative of this approach is the statement that "where a statute forbids the doing of an act, the doing of it in itself supplies mens rea."[46] Again it has been said that "if a statute contains an absolute prohibition against the doing of some act, as a general rule mens rea is not a constituent of the offence."[47]

In all cases of statutory offences requiring investigation of the need of mens rea, English courts claim to be guided by the intention of the legislature, as it is to be inferred from the statute. Judges purport to ascertain and to act upon the will of Parliament. But according to Peiris, "this pretension is fictitious in most instances, since the statute seldom contains direct indications as to the intention of the Parliament in regard to the need for mens rea. Indeed it is possible that Parliament had not adverted to this matter at all. Whatever they purport to do, it is undeniable that the courts in fact base the final decision on their own evaluation of the objectives of the Legislature."[48]
This problem which has created overwhelming difficulty in England, is almost totally obviated in Malaysia because of the fundamentally different structure of the law. In Malaysia, all offences are statutory, in the sense that they are created by statute. The major offences are constituted by the Penal Code,[49] and the rest by principal and subordinate legislation other than the Penal Code.

Theoretically the Penal Code contains an exhaustive statement of the Criminal law. The Penal Code was intended to be a complete code and no reference was to be made to English law in its interpretation, despite the fact that the code was "nothing but a codification of English law shorn of its technicalities."[50] The structure of criminal law in the Penal Code was that it would provide the base of defining the general principles of the criminal law and the common law crimes. The Penal Code, itself being a piece of legislation, could be altered by the legislature and new crimes could be added by later legislation.

Where new crimes were added, the need to restate the application of the general principles to the new crimes was avoided for the Penal Code mandated the application
of these principles to the new crime. Section 6 requires that general exceptions contained in Chapter IV of the Penal Code be applied to all offences under the Penal Code. It reads:

Section 6:
Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions" though those exceptions are not repeated in such definition, penal provision, or illustration.

Section 40 of the Penal Code[51] applies the General Exceptions under Chapter IV of the Code to offences "...punishable under this Code or under any other law for the time being in force." Therefore, all offences under the Code, new offences created by the amendments to the Code as well as any other offences under any other law for the time being in force in Malaysia would be subject to the defences stated under Chapter IV of the Penal Code.
The General Exceptions provide complete defences.[52] As a matter of statutory construction, it is clear that an offence of strict liability cannot be created under the Penal Code except by expressly excluding the application of Chapter IV, which contain the defences based on the absence of mens rea, to the offence. It would appear that Thomson C.J. was in error when in the case of Public Prosecutor v. Mohamed Ibrahim [53], he construed section 292(a) of the Penal Code which makes it an offence to sell or exhibit obscene literature as creating an offence of strict liability.

The spirit of section 6 of the Penal Code [54] was again ignored by Raja Azlan Shah J., as he then was[55] in interpreting the same section of the Code in the case of K.S. Roberts v. Public Prosecutor.[56]

Judges in Malaysia have relied exclusively on English authority in construing certain statutes as creating strict liability. They have effectively removed strict liability offences from the control of the principles of the Penal Code and created an autonomous category of offences. The course of development of case law has been such that it is now too late to argue that the cases accepting strict liability were wrongly decided. In the
formulation of future law, it is imperative that this silent evolution be acknowledged.

There are several reasons for accepting this view. Firstly, the Penal Code was drafted at a time when the law did not recognise the notion of strict liability. The period of the drafting of the Code was between 1836 when Lord McCaulay presented his draft and 1860 when the Indian Penal Code was enacted.[57] The Code was designed prior to the advent of the modern welfare state which in the playing of a more paternalistic role has assumed many regulatory functions. Secondly, even within the common law, strict liability offences are recognised as constituting an autonomous category.[58]

When faced with a statutory provision which is silent as to mens rea, the first task of the court is to ascertain whether the offence is one of strict liability or not. If the offence is construed as one of strict liability, that is the end of the matter. Any objection that this is not giving effect to the structure of the Penal Code must be countered with the retort that the Penal Code was not drafted with the needs of a modern industrialised society with all its hazards in mind. For policy reasons some offences of strict liability are inevitable. If on
the other hand, the offence is not construed as being one of strict liability, then some degree of blame must be required, and it would be at this stage that the question arises whether to apply the "presumption of mens rea" or the "Chapter IV approach."

Based on the above discussion, we can come to the conclusion that generally there is a two track system of criminal law in Malaysia. One track consists of the Penal Code and other statutory offences subject to it and the second track consists of statutory offences regarded by the court as involving strict liability. If this were to be recognised, the courts would then be free to develop the second track of criminal law which is inevitable with all the economic and industrial activity going on and the many social problems that arise from rapid economic development.

English courts have developed certain rules as to when strict liability should be inferred and these rules have generally been followed in Malaysia. Unfortunately, many strict liability offences in Malaysia carry heavy penalties. Severe penalties may flow from the violation of acts prohibited by statutes. A new phenomenon in Singapore for example, is the imposition of mandatory
minimum sentences for strict liability offences. The Arms Offences Act, 1984 imposes a mandatory minimum sentence of five years for unlawful possession of firearms. In Malaysia, a discretion exists in the Public Prosecutor to treat the same offence as an offence which falls under the Internal Security Act. The penalty for such an offence may be death. This seems to be the automatic response to many social problems. It is therefore unrealistic to confine strict liability offences to a dark corner of the criminal law by referring to them as a species of "administrative offences" which "are not criminal in any real sense"[59] when the penalties involved for these violations are so severe.

It appears that the particular social pressures experienced in Malaysia have led to the creation of many strict liability offences though in England, "the climate of both parliamentary and judicial opinion has been growing less favourable to the recognition of absolute offences over the last few decades."[60]
F. Strict Liability in Commonwealth Criminal Law.

The inference of strict liability from the words of a statute creating an offence by reference only to the prohibited act involves judicial legislation. English courts have developed certain rules as to when strict liability should be inferred and these rules have been generally followed in Singapore and Malaysia. This reliance on English case law supports the theory of a two track system of criminal law, as under the Penal Code, the Code provisions are paramount and the courts' task is to interpret the words of the section without the aid of external factors. This is however, only true theoretically. As it is, English case law still retains its vitality under the Codes, for judges only pay lip service to the paramount status of the sections of the Code.

From the point of view of Malaysian law, the rules relating to the inference of strict liability were authoritatively stated in the opinion of the Privy Council in Lim Chin Aik. This decision has been followed by several later decisions which will provide guidelines for the future. Among them are the more recent decision of the Privy Council on appeal from Hong
Kong, *Gammon (Hong Kong) Ltd. v. A.G. for Hong Kong* [62] and the pronouncements of the House of Lords in *Sweet v. Parsley* [63] and *Alphacell Ltd. v. Woodward* [64]. However, in the case of *Teo Eng Chan* [64a] it seems that Coomaraswamy J. had completely overlooked or simply ignored the case of *Lim Chin Aik* which was binding on him. Perhaps this is to enable him to adopt the Chapter IV approach which had never been adopted by the local courts prior to this. In this regard it would be helpful for the courts of this region to have regard to the decisions of some Commonwealth jurisdictions where certain innovative ideas relating to strict liability have been adopted.

The Law Reform Commission of Canada, having observed that regulatory offences were necessary "to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, and higher standards of respect for the environment",[65] candidly remarked: "Let us recognise the regulatory offence for what it is - an offence of negligence - and frame the law to ensure that guilt depends upon lack of reasonable care."[66] Thus courts in Australia, Canada and New Zealand have fashioned the general principles to minimise the incidence of criminal liability without fault. Although there are some important differences,
the principles developed in these three countries are similar. In particular, in each jurisdiction the courts have recognised that, although the legislation may be ambiguous or silent as to any requirement of mens rea or fault, an offence may fall within one of three categories: It may be an offence for which the prosecution is required to prove mens rea, it may be an offence in relation to which due diligence or reasonable mistake may exculpate D, or it may be an offence of 'absolute liability' [67]. As to terminology, offences in the first of these classes are commonly called mens rea offences, those in the intermediate class, offences of strict liability, and those in the third class, offences of absolute liability.

AUSTRALIA.

The key case in Australia, which apparently allowed a defendant to raise a "reasonable mistake" doctrine as a defence to strict liability, is Proudman v. Dayman [68]. The High Court of Australia refused special leave to appeal a decision of an intermediate appellate court imposing strict liability upon a defendant who lent her car to a person who, without her knowledge, did not have a driver's licence. The Court, however, split on the issue of whether the defendant should be allowed to
demonstrate that she was not negligent because she did not know that the person driving her car did not have a licence. The case has been construed however, as allowing such a defence, and this appears to be the current position of that court.

Although it was recognised that the position of the Australian High Court was still unclear, Howard argues that the Court has increasingly embraced the "reasonable mistake" doctrine, saying that "it was safe to say that the reasonable mistake rule is now well established in the common law of Australia, the only problem remaining being its further definition and refinement". He also argues that the court has embraced this approach even where a statute could be read as requiring mens rea, thus solidifying the position of the rule, even if at the same time extending strict responsibility negligence to areas where it ought not to belong.

Peiris suggests that Australian law has not merely accepted the half-way house of inadvertent criminality, but has also accepted "a general or prima facie rule that reasonable mistake of fact is a ground for exoneration in common law offences and statutory offences....The central theme pervading the development of Australian law is the resolute curtailment of doctrines of criminal liability independant of fault." Indeed he asserts that
Australian courts "to a greater extent than the courts of any other Commonwealth jurisdiction show reluctance to draw the inference that criminal liability irrespective of a guilty mind was intended by the legislature."[71] It would now appear that true strict liability is virtually dead in Australia.

**CANADA**

The most recent demonstration of Commonwealth disfavour with strict liability is the decision of the Canadian Supreme Court in *R v. Sault Ste. Marie* [72] In this case, the court held that a corporation charged with the otherwise strict liability offence of polluting water could raise as a defence that its actions were not negligent, and its mistake of fact was reasonable. Dickson J. rejected the exclusive choice between importing mens rea into a penal statute and construing it as imposing absolute liability, creating a third category of statutes that were to be interpreted ( in the absence of explicit legislative direction to the contrary ) as permitting an excuse of due diligence or reasonable mistake of fact. There is now a distinction between strict liability offences on the one hand and those requiring intention or recklessness on the other, thus tracing the dichotomy between public welfare or regulatory offences and offences that are "criminal in the true sense." Dickson J. offered no indication as to
the basis for classifying an offence as regulatory or criminal. However, since statutes creating crimes in the true sense can be enacted only by the Parliament of Canada, it follows from *Sault Ste.Marie* that a penal statute validly enacted by a province will be construed as one of negligence irrespective of the penalty. Ultimately, therefore, the constitutional division of powers becomes the decisive factor in determining whether mens rea is an element of a provincial offence. This produces the odd result that a criminal code provision prohibiting driving with a suspended licence creates a mens rea offence, but a provincial statute prohibiting pollution on pain of imprisonment creates an offence of negligence.[73] Although not totally abolishing strict liability, *Sault Ste.Marie's* decision effectively adopted the recommendation [74] that strict liability be restricted as much as possible.

In the case of *Re Motor Vehicles Act* [75], which is a more recent major decision, the Canadian Supreme Court held that "absolute liability," which does not allow a defendant to present evidence of good faith mistake, and other defences, violates the Canadian Charter of Rights and Freedoms of the Constitution, at least where imprisonment is a possible punishment. The B.C. Motor Vehicle Act provided for minimum periods of imprisonment
for the offence of driving on a highway or industrial road without a valid driver's licence or with a licence under suspension. Section 94(2) of the Act, moreover, provided that this offence was one of absolute liability in which guilt was established by the proof of driving, whether or not the driver knew of the prohibition or suspension. It was held by the Court, per Judge Lamer: "Absolute liability in Penal law offends the principles of fundamental justice. Those principles are, to use the words of Dickson J., to the effect that "there is generally held revulsion against punishment of the morally innocent." [76]

NEW ZEALAND.

In New Zealand, a person responsible for the proscribed conduct or state of affairs may be able to rely on a defence which is variously described as "due diligence", absence of fault, or absence of negligence. In many cases the basis of this defence will be an honest and reasonable belief in facts which, if true, would make the conduct innocent, or reasonable failure to know of facts constituting an offence, but even if the relevant facts were known the defence is available if D was not negligent in bringing about the forbidden event, had done what a reasonable person would have done in the
circumstances, or had taken all reasonable care to prevent the proscribed conduct or state of affairs.[77]

This principle includes a number of circumstances which are commonly regarded as distinct grounds of exculpation. Besides reasonable mistake of fact, it includes cases where a prohibited event or circumstance resulted from an act of a stranger or an event which D was unable to prevent (an "Act of God", or "inevitable accident") cases where it was impossible for D to comply with the law, cases where D's conduct was involuntary, and cases where D acted under compulsion or in circumstances of necessity.[78] In every case however, it will be essential that the exculpatory circumstance was not attributable to earlier fault on D's part, although for the defence to be defeated on this ground it seems that the kind of event which occurred will have to have been "clearly foreseeable", and that it will not necessarily suffice that D was acting illegally or "negligently". [79]

The general nature of the defence avoids the difficult and somewhat arbitrary distinctions that might be drawn between, for example, mistake, ignorance and impossibility,[80] and it also allows the possibility of
a defence of "reasonable care" or "reasonable conduct" even though there may be some doubt whether the requirements of any of the more particular defences have been satisfied. On the other hand, the defence does not extend to error of law made after reasonable enquiry,[81] although there have been suggestions that, at least in relation to minor offences, it might be a defence that a "public official charged with responsibility in the matter" led D to believe that the proposed conduct was lawful.

In New Zealand it is said that, although liability is not absolute, the defence is not easy to establish and that a high standard of care is required. This is emphasised by a tendency to describe the defence as "total absence of fault"[82]. Breach of this standard need not involve moral blame and, at least when the object of the legislation is the protection of public safety or welfare, the objective standard is not to be reduced by reference to the particular characteristics of D.[83]

As regards to the burden of proof, the position in New Zealand and Canada is that it varies according to whether the offence is "truly criminal" or is a "public welfare or regulatory offence" only. In the absence of a
statutory provision to the contrary, if an offence is truly criminal the prosecution must prove the mens rea which is expressly or presumptively required, and D is entitled to acquittal if there is a reasonable doubt on this issue. But if it is a regulatory offence and the terms of the legislation do not make mens rea or fault an essential element of it, the prosecution need only prove that D committed the prohibited act, or was responsible for the actus reus (although he must prove this beyond reasonable doubt), and D has the burden of proving the defence of absence of fault on the balance of probabilities. In Canada this rule was established by the Supreme Court in Sault Ste. Marie[84] and, although it had previously accepted that the persuasive burden did not shift to D in relation to either truly criminal or regulatory offences[85], in Civil Aviation Department v. MacKenzie[86], the New Zealand Court of Appeal adopted the Canadian rule. In these cases Woolmington is held to be concerned only with truly criminal offences and the reversal of the burden of proof is justified on the basis that D will usually know far better than the prosecution how the breach occurred and what had been done to avoid it.

ENGLAND
There has also been a dramatic move away from strict criminal liability in the common law of England as in Canada, Australia and New Zealand. A good example can be seen in the case of *R v. Phekoo* [87]. In this case, the defendant who was an owner of a house, believed that two men who were in the house were squatters and had no right to be there. The owner threatened the squatters with a beating or death if they did not leave.[88] Unknown to him, however, the squatters had sublet the premises from a former tenant, who had not informed the owner of the house of the sublet.[89] To the defendant's argument that his lack of knowledge as to their legal status was a defence, the trial court responded that the statute imposed strict liability, assuming that his actions could be considered as "calculated to interfere with the peace or comfort of the residential occupier."[90] Because the defendant's threats no doubt had this effect, the defendant was convicted. On appeal, the Court of Appeal reversed, requiring a showing of knowledge because conviction would impose both stigma and potentially severe punishment (the statute provided a possible two year prison term).[91]. The Court quoted Lord Diplock's opinion in a related matter, in which he said that "the climate of both Parliamentary and judicial opinion has been growing less favourable to the recognition of absolute offences over the last few decades..."[92] The Court found a half way station, however, declaring in
considered dictum that even under this statute, the mistake had to be reasonable in order to exonerate.

Again in *Warner v. Metropolitan Police Commissioner*,[93] the House of Lords held that strict liability would not apply to a charge of possessing a narcotic. The prosecutor would be required to show that the defendant knew that he possessed something. Lord Wilberforce said:

"I am strongly disinclined to place a meaning (upon this Act) which would involve the conviction of a person consequent upon mere physical control, without consideration, or the opportunity for consideration, of any mental element (of the crime)." [94]

Thus, Australia, Canada, and New Zealand appear to have adopted essentially identical positions in these areas. First, even regulatory statutes tend to be read as requiring mens rea, and therefore requiring the prosecutor to prove recklessness or a higher state of mental awareness. But even if a statute is read as permitting conviction on a prima facie showing of the actus reus, all these jurisdictions now permit the defendant to avoid conviction by proving lack of negligence.
These defences based on lack of negligence and fault have a relevance for Malaysia and Singapore because they are essentially based on the rationale stated in *Lim Chin Aik*[95], the leading decision on strict liability in this region, for the imposition of strict liability. There, the Privy Council stated that strict liability is imposed by statutes to ensure the maintenance of certain standards of safety, honesty, etc. and that the imposition of such a liability on a person who could not avert the harm despite the taking of reasonable care is not to be favoured.

"...it is not enough...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 regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvements 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."[96]

The formulation of this rationale by the Privy Council in a binding Singapore decision opens the possibility of mistake of fact which is based on the absence of negligence on the part of the accused to be a defence. Equally it provides justification for the acceptance of other defences based on the absence of fault.


There have been relatively few steps taken by the courts to arrive at a clear and settled statement of the applicability and scope of offences of absolute liability in the criminal process. The courts have seemed content to decide each particular issue on its merits rather than attempt to fit the decision into some wider and more comprehensive context. As Brian Hogan notes, "there is no discernible pattern which enables the ordinary lawyer to predict with any measure of confidence whether a particular offence will be held to be one of absolute
liability or not. Few areas of law have spawned so much litigation and so little of it is edifying."[97] One of the greatest obstacles to clarification lies in the inability or unwillingness of the courts to conceive of the problem other than in exclusive terms of full mens rea or absolute liability. This restricted approach inevitably leads the courts into a difficult predicament especially with regard to public welfare legislation. It was said that "If (the court) decides that the offence requires full mens rea, it may put an impossible burden on P and thereby virtually nullify the legislation. But if it decides that P need prove no mental element at all, it runs the risk of penalizing innocent and guilty alike to the detriment of justice and respect for law." [98]

In recent years, however, the courts have taken a more responsive attitude and have been prepared to grapple with the problem. Attempts have been made to find the middle path in solving the traditional polarity of approach. The result of this trend has been the decision by the supreme Court of Canada in R v. City of Sault Ste. Marie [99]. The case has seen fit to introduce a third category of liability that lies between the requirement of full mens rea and the imposition of absolute liability. As such the decision is a crucial one and
holds wide ranging implications for the whole field of
criminal law.

Facts.
In November, 1970, the City of Sault Ste. Marie entered
into an agreement with Cherokee Disposal and
Construction Co. Ltd. to dispose of all the city's
refuse. As a direct result of the methods of disposal
used by the company, the Root River and Cannon Creek
became polluted. The company was charged and convicted
under section 32(1) of the Ontario Water Resources
Act.[100] The question also arose whether the City
should also be convicted under the same section.

The section reads:
Every municipality or person that discharges or deposits,
or causes, or permits the discharge or deposit of any
material of any kind into any water....that may impair
the quality of water, is guilty of an offence and, on
summary conviction, is liable on first conviction to a
fine of not more than $5,000 and on each subsequent
conviction to a fine of not more than $10,000, or to
imprisonment for a term of not more than one year, or to both fine and imprisonment.[101]

The fact that the case managed to find its way through five courts, including the Supreme Court of Canada provides an excellent illustration of the limited approach that has characterised the development of the law in this area. Each court felt obliged to take the overly simplistic view that either full mens rea was required or no mens rea was required at all. None of the lower courts felt able or sufficiently confident to explore possible middle ground.

In a unanimous judgement, delivered by Dickson J., the Supreme Court of Canada did not feel itself bound by the traditional and polarized approach to the question of liability and the degree of mens rea required for any particular offence. A scheme suggested by Estey C.J.H.C. in his dissenting judgement in the case of R v. Hickey [102] was adopted. The Court replaced the existing dual basis of liability with the three-tiered structure of liability:

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

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

(3) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault. [103]

From the outset, the court restricted its observations on the concept of absolute liability to those offences referred to as "public welfare" or "regulatory" ones. It does not purport to make any inroad into or attempt to derogate from the principle that lies at the core of the
criminal law, namely, that "to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will."[104] Accordingly, the thrust of the whole decision rests upon a crucial distinction being made between the true criminal offence and the public welfare offence.

"[Public Welfare Offences] are not criminal in any real sense, but are prohibited in the public interest: Sherras v. De Rutzen [1895] Q.B.918. Although enforced as Penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws and the like." [105]

This statement by the Court, prompts a substantial criticism of a most rudimentary and fundamental nature. Although the Court recognises and claims to rest its decision on this crucial distinction, it fails to follow through upon the true significance and implication of such a distinction. Hutchinson[106] is of the view that if such offences are more accurately and happily
described as civil ones, then nothing can be gained from attempting to find them a place in the existing framework of the criminal law. According to him, to dress up such offences in the trappings of the modern criminal law is to exacerbate an already troubled situation. The fact that such offences are heard in the criminal courts is more a result of historical accident than contemporary design. Consequently, the court must have the courage of its convictions and treat such offences as sui generis. Ideally they should be taken out of the criminal courts and placed in the more suitable environment of the administrative process. Such a decisive move could only be made by the legislature. Such an approach has already been taken by the American Law Institute in its Model Penal Code. It feels that such offences should be dealt with on the same footing as civil offences and be punishable with only a fine, forfeiture or other civil penalty. Moreover such a transfer could actually result in increased prevention because the offender would be liable to have his business closed or his licence revoked which would be a much more effective sanction that he would be unable to write off as a business expense. [107]

The Court then proceeded to consider the various competing interests and values at play in the area of "public welfare offences". There are two main strands of
arguments used to justify the imposition of absolute liability in such offences: greater administrative efficiency and improved standards of prevention. It is argued that as the likelihood and extent of risk to social and public interests increase, so the need for mens rea decreases. The interests of society take legitimate precedence over those of the individual: "Justice to the individual is rightly outweighed by the larger interests on the other side of the scales."[108] Such a state of affairs, it is argued, will create a great incentive to take all conceivable preventive steps. Also, it would deter all but the most competent from engaging in such potentially hazardous activities.

With regard to achieving greater administrative efficiency, it is argued that the cost, difficulty and inconvenience of having the Crown prove mens rea would unduly hamper the efficient administration of the courts and heap an unnecessary amount of work on an already overworked court system. In short, the imposition of absolute liability responds to the system's growing concern for the spiralling costs of procedure in cases where it is too expensive, or even impossible, to prove fault, considering the gravity of harm involved. As Sayre declared:
"It is needless to point out that, swamped with such appalling inundations of cases of petty violations, the lower criminal courts would be physically unable to examine the subjective intent of each defendant, even were such determination desirable. As a matter of fact it is not; for the penalty in such cases is so slight that the courts can afford to disregard the individual in protecting the social interest." [109]

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

"In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is argued that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence."[110]
Although respecting and sympathising with such sentiments, the court was not persuaded and felt that "arguments of greater force are advanced against absolute liability." [111] These arguments, in effect, are quite simply the other side of the coin, and they directly challenge the validity of the arguments used to support the imposition of absolute liability. First, the court maintained that, in spite of the weighty and unignorable interest of society, absolute liability too greatly eroded and cut into the fundamental principles of criminal liability. The price of absolute liability is too high and is bought at too great a cost to individual liberty and freedom. The identity and personality of the individual becomes unduly submerged beneath the rising tide of impersonal and aggregate interests. As Fletcher remarks:

"the utilitarian calculus is too commodious a crucible for resolving concrete problems of mistakes of law." [112]

In rejecting the theoretical basis for absolute liability, the court emphasised, however, that this did not mean that they automatically embraced the idea that full mens rea must be an indispensible element of every offence. It would, in both theory and practice, be ill-
advised to reach such a conclusion. Consequently, the possibility of some middle ground being identified presented itself as an attractive and appropriate solution to the problem. Furthermore, by taking such a course, the court was able to accord sufficient weight and importance to the promotion of public health and safety, and at the same time, devise some method to encompass the "thoughtless and inefficient,"[113] without snaring the diligent and socially responsible. In arriving at such a conclusion, the court deserves to be warmly applauded and the results of its discussion can be willingly approved and endorsed.

The way in which this new category of liability (the half-way house) works should be clearly understood. The Crown must first prove the actus reus of the offence to the satisfaction of the court, that is, beyond reasonable doubt. If the Crown is able to do this, two possible courses may follow:

(a) If the defendant chooses to remain silent or does not wish to put any evidence before the court, it will be assumed that he acted without due diligence and a conviction will be registered. There is no onus upon the Crown to prove that the defendant acted negligently; or
(b) The defendant may adduce evidence to show that he was not negligent, but, on the contrary, acted with due diligence. The burden of proving such an issue lies on the defendant. This is commonly referred to as "a reversed onus of proof.", whereby the defendant must show on a balance of probabilities that he acted with due diligence rather than in a negligent manner.

It must therefore be remembered that if, at the end of the day, the defendant is unable to show that it is more likely than not that he acted with due diligence, then the court must decide in favour of the Crown and a conviction is to be registered. This middle ground of liability, therefore, rests upon two central pillars: an available defence of due diligence and a shifting of the burden of proof. In effect, the Court endorsed and gave legal force to the recommendations of the Law Reform Commission of Canada: [114]

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

[115]

The introduction of a defence of reasonable care, thereby creating an offence of negligence, is of great theoretical significance. It effects a move in the basis of liability from the traditional view of punishing only fault based activities to the essentially different ground of imposing criminal sanctions for merely negligent behaviour. Indeed it is a moot point whether negligence can be legitimately classified as a species of mens rea. The court seemed satisfied to extend liability based on negligence to public welfare offences. However, although such liability is a common feature of much statute law now, it remains pertinent to ask the extent to which negligence is a suitable standard of conduct to control such activities.
One of the problems involved in the introduction of a defence based on negligence is the difficulty inherent in applying a test based on reasonableness. In *Sault Ste. Marie* [116], Dickson J. said that "the due diligence which must be established is that of the accused alone", and that when an employer is charged in respect of an act of an employee in the course of employment the success of the defence will depend on "whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system." He added that the availability of the defence to a corporation "will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation." However one has to remember that while objective liability may result in injustice in specific instances, subjective liability is likely to lead to a less responsible and reflective attitude being taken by the individual, thereby taking away the spur to maintain and improve the quality of care taken. For instance, while an external and impersonal standard may be appropriate and fitting in the case of a large corporate conglomerate or municipality, it may work harsh injustice on the defendant who has less knowledge and foresight than the reasonable man. As Jobson remarked, "the company can hire man of foresight, the naturally dull citizen is stuck with God's
endowment."[117] Indeed any balanced scheme of liability must be concerned about not only whether an individual reached the standard of the reasonable man, but also whether he ever had the capacity to do so. Unfortunately, the courts have not warmed to the idea of a variable standard of negligence and, in Sault Ste. Marie, the court did not concern itself with the matter, but was content to state that the test would be "what a reasonable man would have done in the circumstances." [118]
NOTES


2. ibid. 304-5.


4. Model Penal Code 2.05, Comment 1 at 140 (Tent. Draft No.4, 1955)

5. The history of those strict liability offences which are of legislative origin is of quite recent date. One of the first cases in which a statute was interpreted a imposing strict criminal liability was R. v. Woodrow, 15 M&W 404, 153 Eng.Rep.907 (1846)


7. R v. Prince (1875) LR 2 CCR 154; AG v. Lockwood (1842) 9 M & W 378; R v. Bishop (1880) 5 QBD 259

8. Roper v. Taylor's Central Garages Exeter Ltd (1951) 2 TLR.


16. (1875) 13 Cox. Crim. Cas. 138

17. Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, 55.

18. 258 U.S. 250 (1922)

19. 125 Wash. 51, 215 Pac. 41 (1923)


21. (1986) 83 Cr. App. 3 359

22. Exhaustive enumerations of leading strict liability cases can be found in Sayre, op.cit.55.


29. F.M.S. Cap. 45.

30. [1970] 2 M.L.J. 137


34. 15 M & M 404 (exch. 1846)

35. ibid. p. 417.

36. id. at p. 405.


39. CMV Clarkson, Understanding Criminal Law 93-94.

40. Sayre, op. cit. 73. The categories mentioned by Sayre do not constitute an exhaustive list. The growing importance of the subject of strict liability is evidence by the fact that almost as many categories could be added on the basis of case law in the years since Sayre wrote.

41. id. 68.

42. M. Sornarajah, "Defences to Strict Liability Offences in Singapore and Malaysia" (1985) 27 Mal. LR 1,2.


44. at p. 463.

45. I. Bishop, Criminal Law 192-93 (9th edn. 1923)

46. Kat v. Diment (1951) 1 K.B. 34 at p. 42.


49. F.M.S. Cap. 45.


51. Section 40 para 2 reads:
   “In Chapter IV, and the following sections 71, 109. . . . . . , the word “offence” denotes a thing punishable under this code or under any other law for the time being in force.”

52. They include mistake of fact (section 76 and 79), accident (section 80), infancy (section 82 and 83), insanity (section 84), intoxication (section 85 and 86), necessity (section 81) and duress (section 94).


54. Section 6 requires that the general exceptions contained in Chapter IV of the Penal Code be applied to all offences under the Penal Code.

55. Raja Azlan Shah is the present Yang diPertuan Agung of Malaysia.

56. [1970] 2 MLJ 137.


58. M. Sornarajah, ibid.

between "quasi criminal offences" and offences carrying "the disgrace of criminality". Also *Alphacell v. Woodward* [1972] A.C. 824 where the offence was treated as not "criminal in any real sense".


64a. [1988] 1 MLJ 156


66. ibid.

67. G. Orchard, "The defence of absence of fault in Australasia and Canada."

68. 67 C.L.R. 536 (Aust.) 1941

69. C. Howard, Strict Responsibility 6 (1962)

71. Id. at p.132.

72. 85 D.L.R. 3d.161 (Can. 1978)


74. see supra note 65.

75. [1985] 2 S.C.R. 486 (Can.)
per Lamer J:
"A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under S.7 of the Charter of Rights and Freedoms (Constitution Act, 1982, as enacted by the Canada Act, 1982, 1982 (U.K.), c.11) In other words, absolute liability and imprisonment cannot be combined."


77. **Civil Aviation Department v. Mackenzie**


84. (1978) 85 DLR (3d) 161


86. [1983] N.Z.L.R.

87. [1981] 2 All E.R. 84 (C.A.)

88. Id.
89. Id. at 87.

90. Id. at 86.

91. Id. at 92.


93. [1968] 2 All E. R. 356 (HL)

94. Id. at 391.


96. Ibid.


100. **R. v. Cherokee Disposals & Construction Ltd.** (1973), 13 C.C.C. (2d) 87 (Ont.Prov. Ct.)

101. R.S.o. 1970, c. 322, s. 32 (1)

102. (1976), 12 O.R. (2d) 578, 68 D.L.R. (3d) 88, 26 C.C.C. (2d) 23 (Ont. H.C.)., Estey J. was also a member of the Supreme Court in the case under discussion.
103. Supra note 99, at 181 (D.L.R.), 373 (C.C.C.)


105. Supra note 99, at 165 (D.L.R.) 357 (C.C.C.)


109. Supra, note 107. at 69-70.


111. Id.

112. Fletcher, G. "Rethinking Criminal Law" (Boston: Little, Brown, 1978) at 733.


116. Supra note 99, at 185.


118. supra, note 99, at 181 (D.L.R.), 374 (C.C.C.)
CHAPTER 4: DEFENCES TO STRICT LIABILITY OFFENCES

A. Introduction.

The availability of defences to statutory offences which emphasize only the prohibited act and exclude references to mens rea is evident in the slow replacement of the notion of absolute liability with that of strict liability. Howard, who wrote his work on strict liability in 1963, saw no difference between the two terms.[1] Yet, it is common place now to regard the use of the term absolute liability as misleading.[2] It properly belongs to a period when it was thought that no defences were open to an accused once it had been proved that he had committed the prohibited act. A case like Larsonneur[3] which was widely regarded as a "blot on English jurisprudence" was possible during this period.

The transformation from absolute to strict liability entailed recognition of the fact that some middle ground or compromise was needed, which would prevent the imposition of punishment on those whose punishment will
serve no social purpose. This transformation is based on sound policy grounds. If the aim of strict liability is the deterrence of socially harmful behaviour, this aim cannot be furthered by the punishment of the obviously innocent. In fact, the punishment of the innocent could attract public opprobrium for the law. Lord Reid made this point forcefully when he said that "every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and its administration."[4]
The same point was also made by Glanville Williams:

"Little purpose is served by adding to the large numbers of truly guilty defendants the small number of persons who are really innocent. The social argument is all the other way. For, whereas natural evils can often be accepted as part of the price of living, a man-made evil may be strongly and even bitterly resented because it is felt to be unjust."[5]

Thus, the recognition of defences to strict liability is a way of avoiding this.
B. Act Related Defences.

1. Necessity.

The theory of defences to crime proceeds on the basis that if circumstances which negative either the actus reus or the mens rea of the crime had existed at the time of the crime, the accused should be acquitted.[6] Statutory offences of strict liability exclude the need for proof of mens rea, and, a fortiori, exclude the defences based on actus reus. Alternatively, using the analysis made by Fletcher of defences to criminal liability,[7] a distinction could be made between justification and excuse. Excuses are those defences which are based on the law's compassion towards offenders who had committed the offence under overwhelming pressures [8] and offenders who suffer from some disability such as insanity or intoxication. Justificatory defences on the other hand, like self-defence and necessity, are based on the existence of a right in the offender. The accused who acts in self defence or in circumstances of necessity is exculpated because he exercises a right. Necessity in effect is the wider defence, for self-defence is an aspect of necessity.[9] Statutes creating strict liability exclude excusing conditions but should not be read as excluding
the justificatory defences. The latter defences, being dependant on rights, should not be regarded as displaced unless there is a clear indication in the statute that they do not apply.

In supporting this view, for which authority is admittedly meagre, regard must be had to penal policy as well. If deterrence is the aim of strict liability, it is obvious that where there is a present situation of extreme necessity, future threat of punishment, which is often trivial by comparison to the present danger involved in the situation of necessity, is unlikely to have any deterrent effect. [10] In these circumstances, the law will only stultify itself if it insists on a penalty.

From the point of view of strict liability offences, the scope of the defence of necessity should be widened. What should be aimed at is the development of a new defence based upon the existence of overwhelming pressures involved in the circumstances in which the accused finds himself, compelling the commission of the prohibited act.[11] In Malaysia, unlike in England,[12] there is no need to assert that a defence of necessity exists as Section 81 of the Penal Code states the
defence.[13] What is contended for, however, is that in the second track of the criminal law which includes strict liability offences, the scope of the defence of necessity as a defence for such offences is justified by the fact that the harm involved in the situation of necessity is often greater than the harm which the statutory prohibition seeks to avoid.

It is necessary to find authority for the view that necessity is a defence to strict liability. Authority is meagre and is confined to dicta in cases. The most cogent argument is in the logical absurdity involved in not recognising the defence. Take for example, the prohibition order involved in Seah Eng Joo.[14] The statute made it an offence of strict liability for a person subject to the prohibition order to leave his home during the hours specified in the order. Had a fire broken out at the offender's house, it would be highly illogical to argue that the offender should have continued to remain in the burning house rather than violate the prohibition order. Necessity must provide a defence in such circumstances.

In English law, there is authority both for and against the acceptance of necessity as a defence to strict
liability. But the contrary authority in England must be rejected because it flows from the traditional ambivalence of the English law to the defence of necessity.[15] The authority against the recognition of necessity as a defence to strict liability is Kitson[16] where an intoxicated man, sleeping in a car woke up to find that he was alone in the car and that the car was moving downhill. He grabbed the steering wheel and steered the car onto a grass verge. He was convicted of driving under the influence of drink, a strict liability offence under the Road Traffic Act (1930). The absurdity of the decision is apparent upon the mere reading of the facts and the verdict. Surely the law does not expect the person in such circumstances to do nothing despite the possibility of danger to his life. This decision is clearly unjust. It goes against common sense.[17]

The authority supporting the use of necessity in the English law is weak. Howard supports the use of the defence with many qualifications when he observed:[18]

"One can only say, more by way of rational policy than ordered interpretation of the law, that if the facts are sufficiently dramatic, necessity, impossibility and inevitable accident will furnish defences even to strict liability prosecutions; but how dramatic the facts have to be is obscure."
The position that necessity should be a defence to strict liability offences, though it is not, has been stated, obiter dicta, by Lord Denning in an answer to a hypothetical example in the following terms:[19]

"During the argument I raised the question: might not the driver of a fire engine be able to raise the defence of necessity? I put this illustration. A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for sixty seconds, or more, for the lights to turn green? If the driver awaits for that time, the man's life will be lost. I suggested to both counsel that the driver might be excused in crossing the lights to save the man. He might have the defence in law. The circumstances went to mitigation, they said, and did not take away his guilt. If counsel are correct—and I accept that they are—nevertheless such a man should not be prosecuted. He should be congratulated."

A law which convicts of a crime a man who should be congratulated, is not much of a law. Perhaps Lord Denning should have followed his instincts and stated the view that necessity is a defence under the circumstances he envisaged.
In Scotland, there is direct authority favouring the availability of the defence of necessity to charges involving strict liability provided by the case of *Tudhope v. Grubb* [20] In this case, the accused who was in a drunken condition had gone to the garage where he had left his car for repairs. There, an altercation had arisen between the accused and the owner of the garage. The accused was assaulted by the garage owner and his friends. He escaped to the safety of his car and locked himself inside it. But the man tried to smash the windows of the car. He tried to start the car but the battery was flat. The police arrived on the scene and, after all that misery, the accused was charged with attempting to drive a car with an excess alcohol in his blood, contrary to the Road Traffic Act, 1972. The Court acquitted the accused on the basis of necessity. Whether such a result would have been reached in England is uncertain because of the disfavour with which the defence is viewed in England. [21] In view of the fact that necessity is accepted as a defence in the criminal law of Malaysia, there will be a greater receptivity to the Scottish view in this country.

The Malaysian case in which the scope of necessity could have been tested out is *Ali bin Omar* [22] The respondents had been charged under section 49(1) of the Customs Act 1967 for carrying tin ore in a local craft
without the permission of The Director General of Customs. They claimed as a defence that their boat, which was headed elsewhere, had a broken rudder forcing them in distress to enter Malaysian waters. The Magistrate accepted this evidence and held that as the boat was in transit the offence had not been committed. On appeal by the Public Prosecutor, the Judge held that the customs regulations did not create an offence of strict liability. Hence, since mens rea was a relevant ingredient in the offence, the necessity involved in the circumstances negatived the mens rea. This is a clear case of faulty reasoning. Firstly, there is overwhelming authority in Malaysia[23] that the prohibitions in the Customs Act and regulations under it create offences of strict liability. Secondly, necessity as a defence operates, not by negativing mens rea for the offender quite conciously and intentionally chooses to do the prohibited act but by negativing the element of actus reus. The law permits the doing of the prohibited act so that a greater harm could be avoided. The case was rightly decided but for the wrong reasons. The proper reasoning on the facts should have been that the Customs Act created an offence of strict liability but that the violation of the prohibition in situations of extreme necessity cannot be regarded as an offence, because the prohibition was not intended to be applied in such situations.
C. Other Act Related Defences.

Since strict liability offences focus on the commission of the prohibited act, any factor which breaks the link connecting the commission of the act and the accused will provide a defence to the accused. Likewise, where the condition of the accused was such that he could not have committed a voluntary act, then he too could not be said to have committed a relevant act from which liability could flow. These two propositions disclose defences which could be discussed under the following headings:

(1) Non-satisfaction of causation due to third party intervention.

(2) Act of God.

(3) Involuntariness due to automatism.

Most of the authorities for these defences are in Commonwealth precedents but, on the basis that the second track of the criminal law in Malaysia and Singapore are dependant on the acceptance of these precedents, it is submitted that these defences have a valid role to play in the law of these states.
(1) **Third party intervention.**

The case of *Parker v. Alder* [24] where it was held that intervention by a third party which was responsible for bringing about the prohibited consequences cannot provide a defence to strict liability offences has been so battered with criticism that it cannot be considered good law any longer.[25] In that case, the accused a farmer, had despatched milk to the vendee in London by train. He delivered good milk in properly sealed containers for transport to London but some unknown person had adulterated the milk while it was in transit to London. He was found guilty of selling adulterated milk while it was on transit by train to London. The imposition of liability on the accused has been criticised on the ground that he had done everything within his power to ensure that the milk he sold was unadulterated. Though the sacrifice of the absolutely innocent is not unknown in English law,[26] there is now a welcome trend away from such a position and a greater readiness to consider third party intervention as a defence.

The case of *Impress (Worcester) Ltd. v. Rees* [27] is indicative of the trend. In this case, an unknown person had entered the premises in which the accused had fuel oil storage tanks and opened the gate valve of a tank.
The oil escaped into a river and the accused was charged with an offence under the Rivers (Prevention of Pollution) Act.

Cooke J. referred to the need to consider "general and well understood principles of causation" in determining the liability of the accused. He regarded the opening of the valve by the unauthorised person as an intervening cause which was "of so powerful a nature that the conduct of the appellants was not a cause at all but was merely a part of the surrounding circumstances."

It must be recognised that third party intervention is not always a defence. The question could be raised as to whether the imposition of liability in the case like *Impress (Worcester) Ltd. v. Rees* would have resulted in the offender and those in the like situation taking greater precautions against interference by third parties. Considering the environmental harm that pollution could cause, such a course may seem desirable.[28] The question has also been raised as to whether an accused could escape liability by pointing out the person responsible for the act. Where this happens, it is possible to argue that, in the absence of any fault in the accused, he should be discharged and that fresh
charges should be brought against the person who really caused the harm. If conviction results, the possibility remains that an action in tort could be brought against the third party who committed the act.

(2) Act of God.

In *Alphacell v. Woodward*,[29] counsel for the appellant had argued that if the intervening act was one "which no human ingenuity could have foretold"[30] then that act should be characterised as an act of God and a defence should be allowed. Lord Cross considered the argument more fully than the other Law Lords. Referring to the argument that the pollution was caused by the leaves which clogged the impellers of the pump used in the recycling of the polluted water and that this was not the fault of the accused, Lord Cross said:

"This argument is plausible - but I think fallacious. The appellants did not show that the brambles had been placed there by the trespasser or that the inanimate forces which brought them there were in the category of acts of God - analogous to the destruction of the pumps by lightning or the flooding of the tank by a storm of altogether unexampled severity and duration."[31]
The dicta recognises that the occurrences of events beyond the control of the accused could provide a defence to strict liability offences. But the statement of the defence is carefully circumscribed. If the accused could reasonably have anticipated the occurrence of the event and taken sufficient precautions, the defence will not be available. In matters such as pollution, anticipation of obvious risks and the taking of precautions against them may be required. In a New Zealand case, it was suggested that an omission to take such precautions "would probably satisfy the test of recklessness, which is not uncommonly sufficient to constitute mens rea in the strict sense."[32]

(3) Involuntariness.

It is generally accepted that criminal liability can only be based on a conscious and voluntary act.[33] An involuntary commission of a prohibited act cannot be the basis of liability even for strict liability offences. This has been recognised in a series of English decisions.[34] An opportunity for formulating a similar doctrine for strict liability offences was missed in the case of Ayavoo.[35] In that case, the accused had been subjected to an order under the Prevention of Crime
Ordinance to remain indoors after dusk. Cycling home after a dinner so that he could get back to his home before the hour specified in the order, the accused fell over a bridge and became unconscious. He recovered consciousness only after being taken to hospital. He was charged with having breached the prohibition order. The case should have been disposed of on the simple ground that the prohibition order could not have been breached by a person in a state of unconsciousness. Instead, knowing that a conviction on such facts was not morally acceptable, the Judge adopted a rather convoluted line of reasoning. He held that the statute did not create strict liability. Hence, since mens rea was relevant, the Judge held that the accused could not have entertained the relevant mens rea as he was unconscious. He acquitted the accused on this basis. The result was sound but the reasoning was faulty.

In Singapore, the corresponding legislation, a provision in the Criminal law (Temporary Provisions) Ordinance, 1951, was held to create a strict liability offence in *Seah Eng Joo*. [36] This was correct for the purpose of the legislation was the prevention of crime by confining certain types of persons to their homes. The reasoning adopted in *Ayavoo* was perhaps influenced by the misapprehension that once an offence is characterised as
a strict liability offence, no defences are possible. That, as has been demonstrated, is not so.

An actual instance where a defence akin to involuntariness was attempted was in Wong Swee Chin [37] where the accused was charged under the Internal Security Act of Malaysia with the possession of firearms. There had been a gun battle between a gang and the police in the course of which the police had used tear gas. The case for the accused was that when he was found by the police he was unconscious as a result of having sustained seven gun shot wounds and having inhaled the tear gas. He argued that he was not in "conscious possession or control" of the weapons and ammunition found on him. The court, however, found as a matter of evidence that the accused was in fact conscious. The need which the appellate court felt, to examine the evidence at the trial may be taken as an indication that the argument was taken seriously and that had the accused really been unconscious the decision may have been different. But this is unlikely. On such facts, the inference can be drawn that the accused had the arms in his possession prior to losing consciousness and such an inference is sufficient to result in conviction unless, of course, the accused is able to show that the firearms were planted on him after he had lost consciousness. Wong Swee Chin can be interpreted as providing for this possible defence.
Generally, the plea of non-insane automatism is available to an offence of strict liability as an accused in such a state could not have committed a voluntary act. In the case of insane automatism, policy reasons require that the accused be dealt with as in the instances where insanity succeeds as a defence to other crimes. Such a course of action is justified on the basis of social defence. The distinction between sane and insane automatism is well recognised in Commonwealth law particularly after the decision of the House of Lords in Sullivan. The fact that non-insane automatism as a defence to criminal liability is not provided for in the Penal Code need not deter its use as a defence to strict liability. As has been argued, strict liability offences do not fall within the control of the general principles of the Penal Code. Since they are to be treated as autonomous, it can be argued that all defences which accord with principle must be considered by Malaysian and Singapore courts, particularly if they have been accepted in other Commonwealth jurisdictions. On this basis, it is possible to argue that where an accused commits the prohibited act involved in a strict liability offence while in a state of automatism brought about by factors external to the accused, he may successfully plead automatism.
The notion of involuntariness may also include circumstances where the accused is fully conscious but his only logical course of action under the circumstances is the commission of the prohibited act. This idea has been developed in the New Zealand case, *Kilbride v. Lake*. In this case, the accused had parked his motorcar and on his return, he found that a warrant of fitness displayed on the window screen had disappeared. He was charged under the traffic regulations with driving a car on which a current warrant of fitness was not displayed. The accused could have been acquitted on the basis of third party intervention. But Woodhouse J. sought to base the acquittal on the broad definition of voluntariness. He suggested that where the freedom to take any other course than the commission of the prohibited act had been destroyed by events, then the conduct of the accused must be regarded as involuntary. He observed:

"In the present case there was no opportunity at all to take a different course, and any inactivity on the part of the appellant after the warrant was removed was involuntary and unrelated to the offence. In these circumstances I do not think it can be said that the actus reus was in any sense the result of his conduct, whether intended or accidental." [42]
The reasoning adopted here is artificial. It is improper to regard the act of the accused in driving the car after the warrant had disappeared as "involuntary and unrelated to the defence" when it was a deliberate act on the part of the accused done with the knowledge that the warrant was missing. The decision is much admired[43] and discussed in subsequent cases in New Zealand.[44] Though the result in it is to be applauded, the notion of involuntariness stated in it is too broad. The decision could have been better explained on the basis of a broad necessity-related defence. Faced with the choice of leaving the car on the street and going home by some other means and recovering the car after the formalities relating to the loss of warrant had been attended to, the accused chose the less tedious alternative. The wide formulation of a necessity based defence as advocated would have provided a defence without subverting basic principles.

D. Defences Based On Lack Of Negligence And Fault.

In Australia, a series of decisions have created defences to strict liability offences based on the absence of negligence on the part of the accused. Scope has been given to the view that a person who had given all
possible care to avert the commission of the prohibited act should not be found guilty through the defence of mistake of fact.[45] The Australian initiative has been built upon in Canada and New Zealand and there are signs of its acceptance in England. Parallel to this development is the notion that a person who is faultless and who could not have avoided the commission of the prohibited act should not be found guilty.

These defences have a relevance for Malaysia and Singapore because they are essentially based on the rationale stated in Lim Chin Aik[46] the leading decision on strict liability. There, the Privy Council stated that strict liability is imposed by statutes to ensure the maintenance of certain standards of safety, honesty, etc. and that the imposition of such liability on a person who could not avert the harm despite the taking of reasonable care is not to be favoured. The formulation of this rationale by the Privy Council in a binding Singapore decision opens the possibility of mistake of fact which is based on the absence of negligence on the part of the accused to be a defence. Equally it provides justification for the acceptance of other defences based on the absence of fault. These defences may be now considered.
(1) **Conditional Factors and Mistake of Fact.**

The judgement of the Australian High Court in *Proudman v. Dayman* [47] is the starting point for any discussion of the applicability of mistake of fact as a defence to offences of strict liability. There the accused was charged with an offence under the Road Traffic Act of allowing an unlicensed driver to drive his car. The accused contended that for his conviction to stand, "it must be shown, not merely that the driver was unlicensed, but also that the defendant knew it or at all events was indifferent to the question whether he was licensed or not." The accused was convicted and the High Court dismissed her appeal. Her argument that she thought that the driver was licensed was insufficient to provide a defence. Dion J. observed that "the applicant assigned reasons for her alleged belief which neither the Magistrate nor the Full Court thought at all upon the question whether the person she permitted to drive her car did or did not hold a subsisting license." It is clear from the judgements of Rich A.C.J. and Dion J. that had the belief of the accused been based on a reasonable foundation, then the accused would have been acquitted. Her conviction was based, in essence, on her negligence in not finding out. *Proudman v. Dayman* is authority then for the proposition that wherever a strict liability offence involves a conditional factor (in that case, the
driver being unlicensed) a reasonable mistake of fact will provide a defence to the offence. The defence is based on sound policy reasons. If all reasonable precautions had been taken by the accused to prevent the commission of the prohibited act, no objective is achieved by his conviction and punishment. It cannot serve a deterrent aim.

In effect, the type of strict liability offences which contain such conditional factors constitute an intermediate category of offences falling in between absolute liability and liability based on mens rea in that they are based on the mental element of negligence. This is the theme that has been followed in the cases in Australia and elsewhere which have built upon the foundations of Proudman v Dayman. [48] Academic commentators have also received these developments favourably. [49] The Canadian Law Reform Commission suggested that extending this development and using negligence as the least necessary element in all statutory offences is the solution to the problem of strict liability. [50] The House of Lords judgement have also shown favour towards the development of an intermediate category of strict liability. [51]
These developments have influenced decisions in Malaysia and Singapore. It is useful to categorise these cases and discuss them in comparison with the cases from the Commonwealth.

(a) Cases where the statute provides for the defence of due diligence:

The Malaysian case, Melan bin Abdullah\[52\] provides an illustration of the situation in which the statute itself provides for a defence where the accused had exercised due diligence in the conduct of the activity. In this case, the editor-in-chief of a group of newspapers was charged with having allowed the publication of an item relating to a speech made by a politician on the abolition of Chinese and Tamil medium schools. He was charged and convicted under Section 4 (1) C of the Sedition Act which makes it an offence to "print any seditions." The accused appealed against the conviction. His case was that he was editor-in-chief of a group which brought out ten publications and employed over 140 persons. He could not read every item published in them to ensure that no violation of the Act took place. He had to delegate authority to subordinates. He had organised seminars and discussions on the Sedition Act for the staff and had the Attorney General and the
Solicitor General talk to them about the Act. He relied on Section 6 (2) of the Sedition Act which stated that no one should be convicted under the Act if the seditious matter was published "without any want of care or attention on his part." Ong C.J acquitted the accused, holding that this was "a striking instance of the type of cases where, as Dr. Williams put it: "There is a half way house between mens rea and strict liability which has not yet been properly utilised and that is responsibility for negligence." He also relied on dicta in Sweet v Parsley\textsuperscript{[53]} and Lim Chin Aik\textsuperscript{[54]} to support this view and held that the "accused had not failed in the higher standard of care and caution required of him." Support for the approach that was adopted could be found in the more recent decision of the Privy Council in Gammon (Hong Kong) Ltd. v A.G for Hong Kong.\textsuperscript{[55]} The application of Ong C.J's approach does not depend on the existence of the statute of an express provision like Section 6 (2) of the Sedition Act which makes the exercise of reasonable diligence a defence. It is to be read into every statute of strict liability. This, in effect, was the approach adopted by the Canadian Law Reform Commission in its study on strict liability.\textsuperscript{[56]}

There are other cases besides Melan bin Abdullah in Malaysia which could be construed as supporting an
approach based on negligence. In *Osman bin Apo Hamid*[^57] where the charge was one of transporting rice in quantities above those for which the accused had a permit, a defence was raised that the accused had not looked at the permit too closely. Abdul Razak J dismissed this defence with the observation that such a failure amounted to "gross negligence." The judge, after holding that the offence was one of strict liability, need not have spoken of "gross negligence" for the type of defence that was raised would not have been admissible on a classic theory of strict liability. The fact that he felt the need to refer to gross negligence is an indication that he would have been prepared to accept absence of negligence or mistake of fact as a defence.[^58]

In *Pengurus, Rich Foods Products Sdn. Bhd.*[^59] the accused had sold fish floss. An Inspector of Sale of Food and Drugs had bought six packets of the floss and sent it for chemical analysis. The analysis showed that the floss had a content of mercury and that this was not disclosed in the label on the packet as required by the Sale of Food and Drugs Ordinance. The accused said that the mercury was in the fish and that she had not used it in the manufacture of the floss. The Magistrate acquitted the accused.[^60] On appeal against the
acquittal, Yusoff Mohammed J dismissing the appeal observed:

"The learned Magistrate has found as a fact that the Respondent had taken all reasonable steps in ascertaining that the manufacture of the fish floss did not contain mercury as found after analysis. This was a home industry manufacturing the floss on a small scale for distribution locally. The learned Magistrate also found that the Respondent did not act wilfully and that it was not reasonable to impose on a small scale industrialist as the Respondent, the obligation to employ a chemist to analyse the food she produced before marketing them."[61]

The judgement is a sound one. However, the finding that the statute was not one of strict liability because it indicated a defence in Section 21 was unnecessary. It would have been sounder to have proceeded on the basis that absence of negligence is a defence to the strict liability offence created by the statute. The judgement is useful in that it indicates that in assessing negligence, factors such as the scale of the operations run by the accused should be taken into account. But this sympathy for the small businessman may be achieved at the cost of the protection of the consumer. The area gives great scope for analysis of social and economic costs and benefits of any particular decision.
These cases indicate that in, at least, a certain category of strict liability offences which specify conditional factors, mistake of fact and absence of negligence will provide defences to liability in Malaysia and Singapore.

(b) Status and Absence of knowledge as to status.

Some statutes creating strict liability offences impose a status upon an individual and then require him to perform a duty or meet certain standards regarding activity related to that status. The best example of such a situation in Singapore is provided by the case of Lim Chin Aik.[62] The statute and regulations made under it imposed on the accused the status of a prohibited immigrant. The duty attendant upon that status was that he should leave Singapore. A rationale of Lim Chin Aik is that because the accused was not aware of the imposition of such a status and the nature of the duty attendant upon it, he is not liable for the offence of staying on in Singapore while being a prohibited immigrant. The case, then, may be construed as authority for the proposition that where the strict liability offence depends upon status and the performance of a duty flowing from such a status, then ignorance as to such status or duty may provide a defence.
Similar analysis could be made of cases involving licenses and permits. Holders of licenses have a status and are permitted to do certain things and required not to do others. The requirement to avoid certain conduct is often enforced by the creation of a strict liability offence. Mistake as to the status or the nature of the duty will provide a defence.\[63\] In the large majority of instances, because the accused himself applies for the permit or the licence, he would be credited with knowledge of his status and of the obligations flowing from it. But, the case of Lee Ah Kow \[64\] shows that this may not always be the case. Here, the accused was charged with having violated the Customs (Prohibition of Imports) Order, 1978, in having imported cars into Johore Bahru from Singapore without an "approved" permit. The accused had the permits but they were proved to be forgeries. The Customs Act provided for a defence if the accused could show that the goods were lawfully imported. The court held that it was possible for the accused to escape conviction by showing that he did not know that the permit he had to import the cars was defective. The lack of knowledge on reasonable grounds of absence of authority to lawfully import the goods will provide a defence. The conclusion is supported by the dicta in the judgement of the Federal Court of Malaysia in the case of Koo Cheh Yew.\[65\] The case involved the importation of pianos from South Africa. Regulations under the Customs
Act prohibited the import of goods from South Africa. The accused's defence was one of ignorance of the prohibition. The court rejected the defence but explained that in circumstances in which absence of knowledge amounts to a mistake of fact it may provide a defence. The court explained:

"Proof of lack or absence of knowledge, again on a balance of probabilities that the goods in question are prohibited from importations (e.g. as in this case, that the pianos originated from South Africa) may be grounds for an acquittal as a mistake of fact, but a denial of the knowledge of the ban as a matter of law, may not be considered, even if backed by sufficient proof."

There is sufficient authority in Malaysia and Singapore to conclude that a reasonable mistake of fact and an absence of knowledge as a status or a conditional factor may provide a defence to strict liability offences, at least, those of a certain category. In the cases decided so far, the statute itself, express or impliedly, provided for absence of negligence, as a defence. But, even in the absence of such a provision, these two defences could be applied to circumstances where the conviction of a person who had taken all the reasonable care to avoid the prohibited act would be counter
productive and cannot be rationalised on the basis of any penal theory.

Where mistake of fact or absence of negligence is pleaded, evidence establishing the defence on a balance of probabilities can be produced by the defence. This has been the view taken in Australia and Canada.[66] The justification for it was on the basis that strict liability statutes are intended to lessen the burden of proof that the prosecution has to satisfy. It was on this basis that reservations were expressed towards the acceptance of the Australian solution in England. It was argued that the decision of the House of Lords in Woolmington had established that in a criminal case, the burden to show that a defence pleaded by the accused was on the prosecution. This basic principle would be flouted, if the Australian solution was accepted and the accused was required to prove his defence.[67] Whatever merit there may be in this argument, it has no application as far as Malaysia and Singapore are concerned. The burden of proof in criminal cases in these states is stated in Section 107 of the Evidence Act. According to that provision and the cases that have interpreted it,[68] the accused has to establish on a balance of probabilities, any defence he pleads.
The scope for the Australian solution of a half-way house between strict liability and liability based on mens rea in Malaysia and Singapore is therefore viable.

E. Statutory Defences Relating To Possession.

There are two broad areas in which mere possession of substances would attract liability for strict liability offences in Malaysia and Singapore. They relate to possession of drugs and the possession of firearms and explosives. Though statutory offences relating to these areas exist in other Commonwealth jurisdictions, punishments that could be imposed for these offences in Malaysia and Singapore are severe. In Malaysia for example, possession of firearms may lead to a sentence of life imprisonment under the Firearms (Increased Penalties) (Amendment) Act 1974. It may even lead to a sentence of death under the Internal security Act, 1960. In Singapore, possession of firearms carries a mandatory minimum sentence of five years imprisonment. [69]

In law, possession involves physical control over a thing with an animus possidendi. On that basis one cannot
possess a thing if one is not aware of the fact that one has control over it. Hence, a person who is not aware of the fact that he has control over a thing should have, in theory, a defence to an offence based on possession. But the law has developed in a fashion that does not give much scope for such a defence.

Because of statutory differences, it is best to consider drug possession and firearms possession separately.

1. **Possession of drugs.**

In Singapore, section 6 of the Misuse of Drugs Act makes the possession per se of drugs an offence. A distinction is drawn in the legislation between possession per se and possession of a container having the drug.[70] Possession of a container having the drug is specifically provided for in Section 16 which creates a presumption that the person having control of the container has knowledge of its contents. It is left to the accused to rebut the presumption. The making of this distinction itself indicates that possession per se is an offence and that arguments based on the concept of animus possidendi are excluded. Where drugs are found on the person of the accused, it would appear that there is an absolute
presumption that he was aware of their presence. Otherwise, there would have been no need to state a presumption in cases involving containers.

Evidently, the need for Section 16 was the House of Lords decision in *Warner v. Metropolitan Police Commissioner* [71] where it was accepted that a person may possess a box but not its contents. Some, including Lord Guest who dissented in that case, thought that the ruling created "a drug pedlar's charter". Section 16 is intended to counteract the effect of Warner's case by creating a presumption of knowledge of the contents of the container. But this creates a problem, for the creation of the presumption involves an acceptance of the fact that knowledge of the nature of the substance in the container is essential for conviction. If that be so, absence of knowledge of the nature of the substance should be a defence both to possession per se as well as possession in containers.[72] It must follow that since knowledge of control of the substance is an essential precondition for the knowledge of the nature of the substance, absence of the knowledge of control should provide a defence in cases of possession per se. These are logical inferences and they are inconsistent with the objectives the draftsmen of the legislation intended to achieve. The legislation, by responding to an English
decision, has introduced into the law all the uncertainties and inconsistencies of the English law in this area.[73] The scope of absence of knowledge of control or of the nature of the substance as a defence has yet to be worked out satisfactorily in any Commonwealth jurisdiction. The general tendency in Malaysia and Singapore, however, favours the view that possession per se of drugs is an offence of strict liability. Section 16, however, requires that absence of knowledge is to be established by the accused.

2. **Possession of firearms and explosives.**

Possession of firearms and explosives may present similar problems, but, having regard to the size of the object and its obvious nature, innocent possession of it could seldom be established. Mistake of fact, may, however, be relevant in certain circumstances. In *Howell*,[74] an English case, where the accused was in possession of an antique gun and was charged with the possession of a firearm without a licence, conviction was upheld on the basis that the offence was one of strict liability. The possibility of a defence of mistake of fact on the basis that the antique gun was only a collector's piece rather than a firearm was not considered. This may border on being a mistake of law rather than one of fact. In
Malaysia, early decisions have regarded the offence as one of strict liability.[75]

In the case of possession of hand grenades, a strict interpretation of the statute has been adopted in Malaysia. In Leong Kuai Hong,[76] Lord President Suffian held that grenades devoid of explosive substances did not come within the definition of ammunition under the Act and that persons possessing such grenades will not be guilty. This decision makes a reasonable mistake of fact that the grenade did not contain explosives a defence to a charge involving the possession of grenades.

F. Strict Criminal Liability – A Critique.

The defence of strict criminal liability crimes rests on several grounds:

(1) Only strict criminal liability can deter profit-driven manufacturers and capitalists from ignoring the well-being of the consuming public;
the inquiry into mens rea would exhaust courts, which have to deal with thousands of "minor" infractions every day;

the imposition of strict liability is not inconsistent with the moral underpinnings of the criminal law generally because the penalties are small, and the conviction carries no social stigma;

the legislature intended to create strict liability and can constitutionally do so.[77]

1. The Argument from Deterrence.

The argument that only strict criminal liability can effect true safety in an industrial society, or at least motivate highly regulated businesses to act responsibly, may have been the moving force behind English statutes and decisions embracing "strict liability" in the nineteenth century. But even then, as already seen, England did not actually adopt strict liability. Howard repudiates the argument from deterrence by noting:

"The assertion that a potentially inefficient or thoughtless member of society will more effectively mend his ways if he knows that no excuse will be
allowed... is no more than an assumption for which no evidence can be produced in support.... It is scarcely maintainable that the vast majority of regulatory offence, defendants have any thoughts on the matter at all until they are prosecuted."[78]

Sanford Kadish similarly argues that strict criminal liability for the purposes of regulating business is not merely undesirable, but also self-defeating, and urges that civil sanctions be employed instead. "Civil fines, punitive damages, injunctions, profit divestiture programs or other varieties of non criminal sanctions would thus appear to offer equivalent possibilities of enforcing the regulatory scheme. Indeed, this alternatives might enhance the possibilities, since proof and evidentiary requirements are more onerous in criminal prosecutions than in civil suits."[79]

Moreover, to the extent that the deterrence arguments may have carried some weight during the early part of this century, they clearly are inapplicable now. Extensive government regulations of virtually every business generally protects the public as well as can reasonably be expected. To the extent that this is not true, strict tort liability allows private suit.
In this light, then, the marginal deterrence gained by strict criminal liability, particularly when the penalties are light and do not generally entail imprisonment, seems minimal indeed. Sayre argued that only deterrence could justify strict criminal liability and that true strict liability that resulted in imprisonment would be unwise policy and possibly unconstitutional.\[80\] As Peiris puts it:

"There is no empirical evidence that acquittal of a defendant on the ground of absence of mens rea is less effective in terms of deterrence than the meting out of punishment, ostensibly nominal in nature, to accused persons whose conduct in no way exposes them to moral censure."\[81\]

Moreover, the empirical data seem to show that, in practice, there is no such thing as strict criminal liability when governmentally regulated industries are involved. As early as 1956, Frank Remington demonstrated that, although there were numerous strict criminal liability statutes on the books in Wisconsin as well as elsewhere, these statutes were rarely enforced as written; prosecutors generally invoked strict liability proceedings only after they were convinced that the defendants involved were at least negligent, if not more
culpable. [82] After an exhaustive review of the literature, Richardson concludes that in England there is almost never prosecution without some prior history of violation. [83] Albert Reiss has concluded that these agencies, which are more concerned with preventing harm than with punishing offenders, implement a "compliance" programme that is dominated by a co-operative than one aimed at deterring violations. [84]

Similar recent studies have revealed the same pattern. A study in England in 1970 showed that the governmental agency charged with inspecting factories did not actually proceed against companies on a strict liability basis, although the statute both provided for and had been interpreted as providing for such prosecution. [85] Only after several warnings had been issued, and apparently ignored by the factories, was criminal prosecution even contemplated. Even then, indications of compliance usually aborted the criminal prosecution. The same pattern emerged in studies of water pollution control agencies, as well as other agencies. [86] A recent and thorough exploration of all the literature on empirical data concludes:

"It is now widely recognised that the specialised agencies commonly entrusted with the enforcement of
regulatory codes apply notions of fault when exercising their prosecutorial discretion and rarely proceed in the absence of "negligence" in the very least."[87]

Empirical research in Canada similarly concludes that governmental agencies in that country do not enforce "public welfare offences" as written, but remain ready to prosecute those corporations who, having been notified of violations, continue to ignore the warnings of the agencies.[88] This appears to be true in American jurisdictions as well.[89]

Thus, in these countries, the actual enforcement of strict liability statutes in the public welfare realm, as opposed to those areas where there was strict liability in the nineteenth century, has increasingly become based upon some kind of mens rea. In the light of these data, it is perhaps not surprising that recent attempts at law reform have endorsed the abolition of a "negligence" standard that would allow a defendant to prove, sometimes by a preponderance of the evidence, that he or she was not negligent and acted as a reasonable person.[90]
The second argument for strict criminal liability is efficiency; that it would simply take those courts faced with the areas in which strict criminal liability is now imposed too much time to inquire into mens rea, even into negligence, in every case. Thus, proponents point to the overwhelming numbers of regulatory offences, including traffic and parking offences, that face the courts daily and in which there is rarely if ever time for a substantial concern with mens rea. Perkins, for example, says that:

"two assumptions have been made, both seemingly correct: (1) The impressive group of governmental regulations, federal, state and local, cannot be effectively enforced without the aid of penalties; (2) because of important differences between violations of these penalty clauses on the one hand, and true crimes on the other, the former require greater strictness in their enforcement."[91] And another commentator has declared:

"Because of the nature of these offences, it would be almost impossible to secure conviction if the state were
required to prove the criminal intent of persons who violated the law."[92] But Lord Brett has responded:

"The argument...must be based on speculation rather than established fact, for the alternative has not, so far as I know, been tried. But in any event, it is an argument of expediency, akin to that on which the rulers of totalitarian states base their Draconian practices. I believe that we should base our practices on considerations of justice, morality and humanity."[93]

Brett is clearly right. The Perkins position that strict liability is desirable because it is more efficient fails to note that (1) courts often look to mens rea in assessing the penalty to be imposed, and (2) if the situation clearly requires a failure to make such an inquiry, the solution is not to distort the criminal process, but to label such offences by some other terminology, thereby removing any notion that the offence is criminal. This latter path, of course, is the one taken by the Model Penal Code.[94] The suggestion, often found in the literature, of making these offences "regulatory" or "administrative", echoes this concern. To the argument that strict liability is necessary to avoid inquiry into mens rea, Howard argues that the
pursuit of expediency at the cost of justice is undesirable. He also notes that judges do in fact consider mens rea while sentencing. Finally, he suggests that if there is some real necessity, either more courts should be created or the matters could be transferred to a new court system or administrative agency.

(3) The Argument from Triviality.

A third argument for supporting strict criminal liability is that the penalties imposed, indeed constitutionally mandated, are so small that they can be ignored as criminal punishments. This argument attempts to gain strength by noting that such small penalties do not carry with them the usual criteria of criminal penalties, such as social stigma.

Two responses are possible. First, it is not clear that even small penalties will not carry the social stigma that "true crimes" carry. Again, recall Lord Brett's observations that crimes involving imprisonment create a feeling of "guilt, disgrace, a record......[and] are not lightly imposed on one's fellow man......Your society regards gaol as a disgrace, and puts it on a totally
different footing from payment of a fine."[96] In other words, the stigmatic effect of a finding of guilt on the defendant is a substantial penalty, even if no loss of freedom is actually imposed. Thus, Brett affirms that the basis of the criminal law is the moral code by which we live, breach of which incurs the infliction of a moral stigma not to be inflicted in any other situation.

More importantly that proponents of strict liability criminality must, in effect, resort to arguing that no one "really" considers these offences as "crimes" demonstrates the weakness of the position. There is, of course, always the question of whether the defendant can in fact spread the loss. But Fisse argues that "even if [the defendant] is in such a position clearly there should be no conviction since the distribution of fines to consumers would be quite contrary to the public interest and would nullify the deterrent effect upon [the defendant] which conviction is designed to achieve."[97] Furthermore, Howard says:

"Although the idea of constructive crime is repugnant in any context, there is no doubt that much of the force of the arguments which can be directed against constructive murder in particular comes from its being undifferentiated from intentional murder in terms of
punishment otherwise than by executive clemency. If constructive murder were made a comparatively trivial offence, a misdemeanor punishable with a small fine or a short term of imprisonment, it would become much less objectionable.......There is a difference between saying that no one should be exposed to a long term of imprisonment without proof that he intended to commit the crime charged, and saying that because he is not liable it should therefore not be necessary to prove such an intention.......The first proposition works positively in favour of the defendant whereas the second works positively against him.......Since the first does not entail the second, the first should be accepted and the second rejected on the ground that the first is just and the second is unjust."[98]

Thus the argument from triviality is suspect both because it ignores justice and because it can be turned back upon itself: if the penalties are so trivial, they can be inefficacious.
G. Failure Of Strict Liability.

The utilitarian arguments supporting strict criminal liability fall of their own weight. They are either repudiated by the empirical evidence, are self contradictory, or are specious. There is no evidence that strict criminal liability deters. Indeed, there is a good argument that it affirmatively encourages criminal behaviour, or at least dilutes the moral threat that the criminal law has historically carried. Thus, Dean Kadish puts it:

"The more widely the criminal conviction is used for this purpose, and the less clear the immorality of the behaviour so sanctioned, the more likely would it appear that the criminal conviction will not only fail to attain the immediate purpose of its use but will degenerate in effectiveness for other purposes as well." [99]

Similarly, Professor Howard has declared: "It can be plausibly argued that strict responsibility, by inducing an understandable cynicism, is more likely to produce a lowering of standards than a raising of them. Especially is this the case with the defendant who has taken every care to avoid transgressing the law." [100]
There is certainly no evidence that the criminal aspect of strict liability, particularly if the potential punishment is limited to fines and not imprisonment, has any significant marginal deterrence over strict tort liability. Further, there is no reason to believe that calling the fine "criminal", rather than "regulatory" or "administrative" enhances its deterrent value.

There is also something inherently wrong with any system that relies upon discretionary judgement by any individual, whether prosecutor, judge or other functionary, to decide questions of justice as to whether to proceed or not against a specific individual. Although the system does generally allow such discretion, the discretion there is to be exercised shall be based upon a judgement of the strength of the facts of a particular case, not upon the presence or absence of blameworthiness. If, as the empirical data seem to indicate, blameworthiness is an inherent part of the discretionary system, then it should become an explicit, rather than a tacit, aspect of that system. To do otherwise mocks the notion of a rule of law, and puts responsibility for justice in the hands of those whose prime, and perhaps exclusive, duty it is to move the system forward. As Leigh has put it: "One cannot readily assume that because studies show that
prosecutions are not commenced unless the offender was at fault, blamelessness is therefore adequately catered for by prosecutorial discretion."

These criticisms, however, are themselves all utilitarian in nature. They suggest, falsely, that if strict criminal liability were shown to be efficacious, the bulk of objections to the concept would dispel. But the predicate for all criminal liability is blameworthiness. It is the social stigma which a finding of guilt carries that distinguishes the criminal from all other sanctions. If the predicate is removed, the criminal law would then be set adrift, to be treated like any other set of legal rules. The unique character of the criminal determination disappears.

Defenders of strict liability are forced to argue that there is no stigma imposed by strict criminal liability. Paulus for example argues, without substantiating any data, that a conviction under a strict liability provision does not stigmatize. He states:

"The strict liability provisions helped to sufficiently stigmatize lawbreakers to prevent offenders from repeating their action, but not to the extent that a moral stigma became attached to their persons....."
Paulus continues, "stigmatization as a result of a prosecution is minimal, because the magistrates and judges use their own discretionary judgements to minimise the effects of a conviction." [104] The author does not, however, discuss the methods by which this stigma is reduced, and does not explain how "discretionary judgements" can minimise the effects of a conviction.[105]

There is now willingness by some otherwise harsh critics of strict liability to allow strict criminal liability so long as imprisonment is not involved.[106] This willingness is in fact misguided. If there is a stigmatization brought by the finding of criminal guilt, that stigmatization occurs whatever is the punishment. The degree of punishment may only enhance the stigma, but it does not create it.

There is the fear that rejection of strict criminal liability will soon overwhelm the courts with searches for mens rea in such trivial cases as traffic violations. Two alternatives have presented themselves:
(1) The "halfway house" of negligence, with or without a shift of the burden of proof adopted by a number of the Commonwealth countries.

(2) Removing the label "criminal" from these conducts, and either calling the sanction "civil" or "administrative" or, as the Model Penal Code would have it, a "violation" rather than a crime.

The first alternative has already been adopted in relation to many former strict liability offences by the introduction of "due diligence" defences. The crime remains prima facie one of strict liability, thus not increasing the prosecutor's burden, but if the defendant can show that he was not negligent, he will escape liability. Thus the crime effectively becomes one of negligence, except in relation to the burden of proof.

A good local example of a "due diligence" defence in operation is to be found in the following Malaysian case of Melan bin Abdullah v. Public Prosecutor. The accused in this case was editor-in-chief of a group of newspapers in one of which was published an article relating to the abolition of Tamil and Chinese medium schools. He was convicted of the offence of publishing a
seditious publication contrary to section 4(1)(c) of the
Sedition Act and he appealed against his conviction.

The submission made by the prosecution was that section
4(1)(c) creates an offence of strict liability. The
appellant however, in answer thereto, relied on the
provisions of section 6(2) which reads:

"No person shall be convicted of any offence referred to
in section 4(1)(c) or (d) if the person proves that the
publication in respect of which he is charged was
printed, published, sold, offered for sale, distributed,
reproduced or imported (as the case may be) without his
authority, consent and knowledge and without any want of
due care or caution on his part, or that he did not know
and had no reason to believe that the publication had a
seditious tendency."

The prosecution conceded that the appellant had no prior
knowledge of the publication of the offending subheading,
but submitted that, although he had delegated his
authority to the sub editors under him, he was still
responsible as he had the power of veto and in the
circumstances he had failed to exercise due care and
caution, and thus could not be held exonerated by the provisions of section 6(2).

The appellant however gave evidence of the responsibilities of his office, as editor-in-chief, over as many as ten publications of the Utusan Melayu Group, employing a staff of over 140 persons. He had delegated authority to trusted subordinates. On the Sedition Act, he had organised seminars and discussions, relating in particular to the "sensitive issues" and had instructed his staff on the relevant law as he understood it. Although responsible for all Utusan publications, it was impossible for him to read all of them everyday.

Ong CJ, the appellate Judge viewed this as a striking instance of the type of cases where as Glanville Williams put it:

"There is a half-way house between mens rea and strict responsibility which has not yet been properly utilized, and that is responsibility for negligence." [108]
He also quoted Lord Pearce's stamp of approval when he said in the case of *Sweet v. Parsley:* [109]

"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."

Though the learned special president appeared to have thought that the principle respondent superior was sufficient, the Appellate Court applied principles in negligence to the appellants conduct and held that he had not failed in the higher standard of care and caution required of him. His conviction and sentence was, therefore set aside.

Professor Leigh has this to say of the half-way house of negligence:

"..........in general, we have arrived at a regime of fault which, based on statutes, exculpates the diligent and careful defendant." [110]

Professor Saltzman argues that, "although negligence is cast in objective terms, its actual application in a particular case presents the opportunity for a personal assessment of the defendant's blameworthiness." [111]
The problem of this halfway house of "negligence" is in its exact meaning. Is negligence as used here equivalent to "recklessness" as used elsewhere in criminal law or is it going to take the tort standard of negligence. Howard declares:

"Negligence is excluded from mens rea because negligence includes a reference to some material degree of inadvertance, whereas inadvertance to a relevant fact or state of affairs can never amount to mens rea...."[112]
NOTES


2. Smith and Hogan, Criminal law, 87.


5. G. Williams, Textbook on Criminal Law, 931.


7. Ibid.

8. An example would be duress.

9. Self defence has hardly any scope in strict liability offences. For this reason, it is important to stress the wider scope of necessity.

10. Self defence as a defence to murder is rationalised on this basis.

11. Support for the creation of a wider defence of necessity could be found in Fletcher, op. cit. at pp. 818-819.

12. The scope of the defence of necessity, if one exists, is unclear in English law. Smith and Hogan, Criminal Law, pp. 201-208.

13. Section 81 reads: "Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property."

15. see footnote 12.


17. In similar situations, Australian courts have preferred to regard the accused as not having performed the act of "driving". The Australian and other authorities are considered in Tink v. Francis (1983) 2 V.R. 17. English courts have not been prepared to adopt this technique. McQuaid v. Anderton [1981] 1 WLR 154; McDonagh [1974] 2 All E. R. 257.

18. Howard, Strict Responsibility, p.207; see also Leigh, Strict and Vicarious Liability, p.5-6.


25. For criticisms of the case, see G. Williams, Textbook pp. 930-932.


28. In Alphacell v. Woodward [1972] A.C. at p.385, Lord Wilberforce recognised the existence of the third party intervention defence but qualified it by stating that it may not apply in all circumstances.

29. [1972] A.C.

30. ibid., at p.831; The argument was accepted in the lower court by Bridge J.: see [1972] 1 Q.B. 127 at p. 137.

31. Also see Lord Pearson, ibid.at p. 845; Lord Salmond at p. 847.


38. Howard, Strict Liability, pp. 199-201; also see B. Wootton, Crime and the Criminal Law (1968).


40. On automatism, see Sinnathamby [1956] MLJ 36.

42. _ibid._, at p. 593.


47. (1941) 67 C.L.R. 536.


52. High Court, Kuala Lumpur, Criminal Appeal No. 103 of 1971.


55. [1984] All E.R.

57. [1978] 2 MLJ 38.

58. at p 40.


60. Section 21 of the Ordinance provided a defence: 
"...... it shall be no defence that the defendant did not act wilfully unless he also proves that he took all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance."

61. The imposition of such an obligation is counterproductive. As Kadish found, the costs would be transferred by the manufacturer to the consumer.


63. Many English and Commonwealth cases may be analysed on these lines. e.g. see cases on bigamy; Tolson (1889) 23 Q.B.D. 168.; O'Sullivan v Fisher [1954] SASR 33; Howard, Strict Liability, pp 48 - 50.


66. For Australia, see Proudman v Dayman (1941) 67 C.L.R. 536; For Canada, see City of Sault Ste. Marie (1978) 40 C.C.C.(2d) 353; For New Zealand see MacKenzie v. Civil Aviation Department. (1984) 8 Cr. L. J. 54.


70. This analysis is supported by the judgement of Wee Chong Jin C.J. in Seow Koon Guan [1978] 2 MLJ 45; see also Syed Ali bin Syed Hamid [1982] 1 MLJ 132.


72. Smith and Hogan, Criminal Law, op. cit. p. 94.

73. In Canada, possession of drugs unaccompanied by knowledge of possession is not an offence. Beaver (1957) 118 C.C.C. 129; but possession of undersized lobster not knowing it was undersized has been held to be an offence. Pierce Fisheries [1971] S.C.R. 5.


77. Seago responds to the first three of these reasons stated as follows:
   "The prosecution often finds it extremely difficult to prove the mens rea of a murder charge, but rarely is the argument advanced that therefore murder should be a crime of strict liability....It is not very comforting for a butcher, who relies on his reputation, to know that the Court is sorry for his conviction and has awarded only an absolute discharge.....This [deterrence argument] has always appeared to be taking a sledge hammer to crack a nut."
   (see R. Seago, Criminal Law 78 (1981)

78. see C. Howard, Strict Responsibility 6 (1962) at 24-26.


80. Sayre, "Public Welfare Offences" 33 Colum. L. Rev. 55 (1933)


87. Richardson, supra note 7. 258, at 296.


91. Perkins, "Alignment of Sanction with Culpable Conduct," 49 Iowa L. Rev. at 332.

92. Note, "The Development of Crimes Requiring No Criminal Intent," 26 Marq. L. Rev. 92, 93 (1942), see also Note, "Liability Without Fault: Logic and


94. Model Penal Code and Commentaries 2.05 (1985)


96. Brett, supra note 93 at 436.


98. Howard, supra note 95 at 30-31.


100. C. Howard, Strict Responsibility 6 (1962)


104. Id. at 459.

105. Id. at 461.


110. L. Leigh, Strict and Vicarious Liability at p. 103.

111. Saltzman, supra note 106 at p. 1582.

112. Howard, supra note 100

And finally I would like to say:
STOP ALL FRENCH NUCLEAR TESTING IN THE PACIFIC!
Criminal law is increasingly used to regulate ordinary and unremarkable conduct. Thus the danger that criminal sanctions will be applied in an arbitrary manner to unblameworthy people who have had no notice of possible criminal liability and no opportunity to conform their behaviour to law increases greatly.

The maxim "ignorantia juris (legis) non (neminem) excusat" (ignorance of the law is no excuse) has much to answer for. Though it has long thought to be basic to criminal law, the principle seems no longer appropriate when criminal law applies in surprising ways to otherwise ordinary behaviour. This common law doctrine has now been codified in many common law jurisdictions. In Malaysia, the doctrine is contained in section 76 and 79 of the Penal Code.
A. Distinction Between Sections 76 and 79

Section 76.

Nothing is an offence which is done by a person who is, or who, by reason of mistake of fact and not by reason of mistake of law, in good faith believes himself to be, bound by law to do it.

Illustrations

(a) A, a soldier, fires at a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(b) A, an officer of a court, being ordered by that court to arrest Y, and after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

Section 79.

Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law in doing it.
Illustration:

A sees Z commit what appears to A to be a murder. A in the exercise, to the best of his judgement exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the act, seize Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self defence.

The first part of both sections 76 and 79 is not related to the doctrine of mistake at all. It merely states that nothing is an offence which is done by a person who is bound by law to do it (section 76) and nothing is an offence which is done by a person who is justified by law in doing it (section 79). In other words whatever one does when one is either bound by law or justified by law in doing it, the act will on the strength of these sections not be an offence.

The second part of both the sections however is related to the doctrine of mistake of fact and not mistake of law. Under section 76 the accused acts, by reason of mistake of fact, because he believes he must act; while under section 79 he acts, again by reason of mistake of
fact, because he thinks he is justified in acting so. Nigam has suggested that "it would have been better and more logical if one of these sections had dealt with mistake of law and mistake of fact and the other with legal compulsion and legal justification,"[3] since the language used in both the sections is mostly similar and even has some clauses in common.

When a person is ignorant of the existence of relevant facts, or is mistaken as to them, his conduct may produce harmful results which he neither intended nor foresaw. Formerly, under systems of strict liability, the only defence available to such a person was to establish that the harm was not really caused by him. Later on, however, when it was established that criminal liability should depend upon objective moral guilt, the scope of the ancient defence was widened and the accused could plead that he had acted under mistake and that his conduct had not really been voluntary. Thus in the seventeenth century Hale wrote:

"But in some cases ignorantia facti doth excuse, for such ignorance many times makes the act itself morally involuntary."[4]
This plea virtually amounted to saying that it was not his act, because it was not voluntary. The defence of mistake is a special privilege allowed by law to a person accused of a crime. The rule nowadays is that where a man in his course of conduct, which resulted in the unlawful harm of which he is being tried, had acted on the belief that his acts were different from what it has now been established, then his trial should proceed on the legal fiction that the facts were as he supposed them to be and not on the true facts. In other words, the tribunal has to come to a decision on the basis of pretended facts which the prosecution is not allowed to deny.

Under the defence of mistake an attempt is made to prove the absence of mens rea. In other words, mistake negatives the existence of a particular intent or of that foresight which the law requires to make the accused liable. Russel observes that:

"Mistake can be admitted as a defence provided:
(1) that the state of things believed to exist would, if true, have justified the act done;
(2) that the mistake must be reasonable;
(3) that the mistake must relate to fact and not to law."
B. Mistake Of Fact.

There is no definition of mistake of fact in the Penal Code. A mistake of fact is an error as to the existence of any state of things. It may arise from inadequate or wrong information, forgetfulness, negligence or superstition.

In the case of Chirangi v. State of Nagpur, the accused killed his son Ghudsai by mistake thinking he was a tiger. He was suffering from bilateral cataracts which has affected his vision. There was also evidence that he had abscess in his leg which would have produced a temperature which might have caused a temporary delirium. This might have created a secondary delusion affecting his vision. He was charged with murder under section 302 of the Indian Penal Code. It was held that he was protected under section 79 of the Penal Code as his act was done under a bona fide mistake of fact. The court was in agreement with the decision of an earlier case of Bonda Kui, a case in which a woman in the middle of the night, saw a form, apparently human, dancing in a state of complete nudity with a broomstick tied on one side and a torn mat around the waist. The woman taking the form to be that of an evil spirit or a thing which consumes human beings, removed her own clothes and with repeated
blows by a hatchet felled the thing to the ground. Examination showed, however, that she had killed a human being who was the wife of her husband's brother. The conviction and sentence of the accused woman under section 304 of the Indian Penal Code was set aside, on the ground that she was fully protected by the provisions of section 79, inasmuch as the statements made by her from time to time which constituted the only evidence in the case, demonstrated conclusively that she thought that she was by a mistake of fact, justified in killing the deceased who she did not consider to be a human being, but a thing which devoured human beings.

According to Jerome Hall¹¹, "The meaning of factual error, as defined in the criminal law, represents a common sense version of the philosopher's definition: "All error consists in taking for real what is mere appearance." For example, a person looks at a far-off object and believes he sees a man; later, on closer approach, he decides it is a tree. The first opinion is then recognised as error. But the object may not actually be a tree; perhaps it is a dead stump or a bit of sculpture. Indeed, on examining it the next morning by aid of daylight and a clear head, our actor decides that he was mistaken in both judgements the night before. In this view he will be supported by all
normal persons, who, viewing the object under "adequate" conditions, agree: "It is a tree stump"; moreover, they would not concede the possibility of the slightest error in this opinion. Thus, an opinion (judgement or belief) is erroneous by reference to another opinion which corresponds to the facts."

The liability of the accused would therefore be judged by the facts as he supposed them to be in his mistaken belief. If, for example, A intends to commit housebreaking of flat number 35 but went instead to flat number 36, his mistake is immaterial as all the actus reus and mens rea of the offence of housebreaking under section 445 of the Penal Code would be satisfied even in the circumstances supposed.

C. Mistake Of Law And Ignorance Of Law.

Mistake of law is expressly excluded from sections 76 and 79 of the Malaysian Penal Code. There is no definition of mistake of law under the Code. However, the maxim "ignorantia juris (legis) non (neminem) excusat" is so universally accepted under the Anglo-American judicial
system, that to question its soundness is considered a legal heresy.\[^{[9]}\] In *Tustipada Mandal*\[^{[10]}\], Ray C.J. said:

"Mistake of law ordinarily means mistake as to existence or otherwise of any law on a relevant subject as well as mistake as to what the law is."

There are therefore two aspects to the maxim. The first relates to ignorance as to the existence of the law; the second, as to the interpretation of what the law actually is. Strictly speaking, so far as the former is concerned, there cannot be a mistake as to something whose existence one does not know as one does not apply one's reasoning to a non-existent state of things. With regard to the latter, a mistake of law can arise from a process of reasoning as to what the law is. Thus, a mistake of law could arise as to a wrong interpretation of the law.

(a) Ignorance as to existence or non existence of law.

The distinction between ignorance and mistake was well noted by Bertram C.J. in the Ceylon case of *Weerakoon v. Ranhamy* \[^{[1]}\] (1921)23 N.L.R. 33
"Now, in the view that I take of the effect of section 72 (i.e. Section 79 of the Malaysian Penal Code), ignorance is not the same as mistake. Mistake, to my mind, implies a positive and conscious conception which is, in fact, a misconception. Thus, to take the case of the man who was convicted of selling a medicine containing "a trace of ganja"...it does not seem to me that this man made a bona fide mistake about this trace of ganja. He did not know that it was there. He simply did not think about it, and cannot be said to have made a mistake on the subject. As I understand the matter, therefore, the English doctrine (i.e. ignorance or mistake) covers both ignorance and mistake, our own formula only includes mistake."

However a contrary view was taken by Schneider A.J. (at page 58) when he said:

The word "mistake" in section 72 must be taken to include ignorance. Sections 69 and 72 are a paraphrase of the English Common Law maxim in its application to Criminal Law. Ignorantia facti excusat; ignorantia juris non excusat."

Generally the institutional writers and the courts have treated the two concepts of ignorance and mistake as
synonymous. On closer analysis, however, clearly they may not be factual synonyms for ignorance of the law might suggest knowing no law on a particular subject, while mistake would suggest knowing something of the law but not enough, or the wrong thing. Thus in this sense ignorance would mean "no opinion whatever" and mistake "an incorrect opinion."

According to Matthews,[11a] it is often however, that ignorance of the law is used in the different sense, for example, "not knowing X is prohibited," which does involve having a particular (and wrong) opinion, i.e. that X is permitted. Here the absence of knowledge of the prohibition leads D to take a particular view of the law. In this sense ignorance and mistake are synonymous.

Professor Glanville Williams distinguishes between simple ignorance and mistake thus:

"Now mistake is a kind of ignorance. Every mistake involves ignorance but not vice versa. Ignorance is lack of true knowledge, either (1) because the mind is a complete blank or (2) because it is filled with untrue (mistaken) knowledge on a particular subject."
The first variety, lack of knowledge without mistaken knowledge, may be called simple ignorance. The second variety, lack of true knowledge coupled with mistaken knowledge, is mistake. Ignorance is the genus of which simple ignorance and mistake are the species."

In the case of simple ignorance, an accused does an act in ignorance that the law makes such act criminal. The misconception is therefore due to lack of knowledge or the mind is a complete blank and having no knowledge at all. This case of simple ignorance can be illustrated as when a man already married, marries again in ignorance that a second marriage is unlawful.

Mistake on the other hand is when the accused does an act under a misconception of the legal effect of certain facts; that is, he gets a wrong view of a situation as a result of the improper application of the law to facts. Here an act, neutral in itself, becomes criminal by reason of some preceding situation or status. Thus, when a man marries, the criminal character of the marriage depends upon the question whether the man was already married. Such a question is a question of law, because it deals with the application of law to facts.
It is the contention at this stage that since on principle and analogy, a different result may and should properly be reached in certain cases where a criminal act is committed under a misconception of law, to simply use the maxim "ignorance of the law is no excuse" to reject defences raised in all cases of misconception of law would be totally unacceptable.

However Professor Stuart favours an analysis which does not recognise this distinction as significant, because to him "The attempted distinction between ignorance and mistake often turns out to be one of "pure sophistry" and an empty game of terminological gymnastics."[12]

But what is important here is not factual coincidence between ignorance and mistake, rather value equivalence. [13] Should they be treated equally by the law? Although it is arguable that there is (or ought to be) a different degree of moral culpability attaching to one who takes a particular though wrong view of the law than to one who never considers the lawfulness of his actions at all, the cases rarely seem to support any distinction.
In *R v. Bailey* [14] D, the captain of a ship on the high seas off West Africa, fired upon another ship in circumstances made criminal only six weeks before, when D could not possibly have known of the passing of the Act, since it was enacted when he was far away at sea and before the news of its enactment could reach him. At the Admiralty Sessions, D was convicted, notwithstanding his ignorance of the existence of the prohibition. This would be a case of simple ignorance and is usually cited as the high-water mark of the *ignorantia juris* doctrine. It is often argued that if such a defendant can be found guilty, so must others with greater opportunities of knowledge.

In the case of *In re Barronet* [15] two Frenchmen were charged with wilful murder because they had acted as seconds in a duel in which one man had met his death. They alleged that they were ignorant of the fact that by the law of England, killing an adversary in a fair duel amounted to murder. Hence, their ignorance had resulted in a mistaken belief. However Coleridge J., said:

"We are told to lay down a different rule to what we should apply to native born subjects, because these persons are foreigners and ignorant of our law relating to duelling. But I agree with the Lord Chief Justice,
that foreigners who come to England, must in this respect be dealt with in the same way as native subjects. Ignorance of the law cannot, in the case of a native, be received as an excuse for a crime, nor can it any more be urged in favour of a foreigner." [16]

It appears that if an element of law enter into the mistake of defendant, such mistake is held to be no defence. To this general rule, there is however an exception. When a specific criminal intent or knowledge, as distinguished from the criminal mind, is a requisite element of the offence, and such intent or knowledge is negatived by ignorance or mistake, it is held that the defendant shall not be convicted, notwithstanding the maxim. For, though ignorance of law is no ground of defence, it is evidence of mental condition.

In other words, if it is the essence of the offence that there must be proof of a particular evil intent, it will be held that ignorance of law may be proved to rebut the positive evidence regarding the existence of mens rea. Take for instance a case of theft. It is not open to one, accused of theft, to get rid of his liability by saying that he was not aware of the law which made theft punishable. But ignorance of law may be pleaded for a
collateral purpose. For example, to bring a case within the definition of theft,[17] it must be shown that there was dishonest taking. Thus, a bona fide claim of right if proved, would therefore take the case out of the definition of theft, and it would be immaterial that such claim was based on a view of law that was erroneous. Supposing for example, a Muslim dies, leaving an illegitimate son and daughters. The son removes some of his properties without the knowledge and consent of the heirs in the honest but mistaken belief that he also had a share in the estate of the deceased. This ignorance of law may be admissable to negative mens rea.

In the case of Lim Chin Aik v. R,[18] a ministerial order was made under a Singapore Ordinance prohibiting D from entering Singapore but no provision was made for publishing this order or bringing it to D's attention. There was no evidence that the order was served on or communicated to D and it was conceded that mens rea on his part had not been proved. The Privy Council were unwilling to allow the Crown to argue that it was a case of strict liability and that ignorantia juris non excusat should govern. Lord Evershed said:

"It seems to their Lordships that, where a man is said to have contravened an order or an order of prohibition, the
common sense of the language presumes that he was aware of the order before he can be said to have contravened it."[19]

The principle ignorantia juris non excusat cannot apply if there is "no provision......for the publication" of a certain type of law or regulation, nor "any other provision designed to enable a man by appropriate enquiry to find out what the law is."[20]

These remarks by his Lordship merely concern the lack of legislative provision for making laws known or knowable, but it is thought that the practical impossibility of discovering the terms of a particular law might also justify an exception to the principle. As Thomas Hobbes wrote in much earlier times:

"The want of means to know the law, totally excuseth. For the law whereof a man has no means to inform himself, is not obligatory."[21]

It was accordingly decided not to be a case of strict liability and D's conviction was therefore quashed.
The Privy Council have also said, however, that the publication of an order in terms of the Statutory Instruments Act 1946 is sufficient to impose a duty to know it, and to render irrelevant any plea of ignorance,[22] which is perhaps a little unrealistic in view of the difficulties which face the layman, and often enough the lawyer too, who seeks to discover which statutory instruments are operative at any time.

It might be argued that cases such as **Lim Chin Aik** are special on the grounds that they concern (implied) mistake of fact. But according to Matthews, "it is sophistry to explain them away on that basis for the truth of the matter is, that they are offences where an appreciation of the illegality is necessary for conviction In other words, ignorance of the law is (in a clumsy sort of way) an excuse."[23] Barwick C.J. said:

"**Mens rea** may in some cases.....require that the defendant should know that the act is unlawful. That element of the offence itself cannot be eliminated in such a case by saying that ignorance of the law is no excuse. The defendant who is not shown in such a case to know that the act is unlawful needs no excuse. The offence has not been proved against him".[24]
It is submitted that since some offences do, while others do not require knowledge or specific criminal intention before a conviction can be secured, it would be foolish to ignore the necessary ingredients of each particular offence simply by using a well known maxim such as "ignorantia juris non excusat".

According to Gross[25] the suggestion that the maxim ignorantia juris neminem excusat always leads to a summary refusal of any attempted defence is misleading for under certain unusual circumstances relief is sometimes available.

"One specimen of this unusual sort of legislation is a provision creating criminal liability for a public official who uses the powers of his office in deliberate disregard of the law, even though he might also violate the law quite innocently in the course of his duties and incur no criminal liability."[26]

Examples of this can be found under Sections 77 and 78 of the Malaysian Penal Code.[27]
Section 77:

Nothing is an offence which is done by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Section 78:

Nothing which is done in pursuance of, or which is warranted by the judgement or order of a Court, if done whilst such judgement or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgement or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

Sections 77 and 78 provides immunity from criminal prosecutions to Judges and those carrying out their orders. The propriety of the rule is obvious and need not be discussed at any length. As observed by Crompton J. in *Fray v. Blackburn*[^28], the rule exists for the benefit of the public and was established in order to secure the independence of the Judges and prevent their being harassed by vexatious actions. The question of
good faith only arises when there is no jurisdiction. When there is jurisdiction the immunity extends even to acts which constitute an abuse of it.

It is rather strange here that the law should provide protection to a judge who believes he is exercising any power given to him by law. It appears that Judges will get protection under section 77 even though by reason of mistake of law, as long as it can be proven that it has been done in good faith. Section 52 of the Penal Code gives a negative definition of good faith.

Section 52:

Nothing is said or done in good faith which is done or believed without due care and attention.

Thus, absence of good faith simply means carelessness or negligence.

Section 78 is a corollary to section 77 and it affords protection to court officers acting under the authority of a judgement or order of a Court of justice. Though
Crompton J. seems to suggest that when jurisdiction is assumed on a wrong view of the law it would then not be a valid defence[29], the matter is not free from doubt, because in cases where jurisdiction is assumed on an erroneous view of the law and if the Judge acts in perfect good faith, should such a Judge be liable to actions, civil or criminal? If so, it would make the position of judges one of great difficulty.

Therefore, an honest and bona fide mistake of law may be a good defence both under section 77 and section 78 of the Penal Code. Protection given to Judges and the court officers as can be seen from both the sections would provide clear evidence for the abandonment of the presumption that everyone shall know the law.[30]

In the case of a soldier, the Criminal law does not recognise the duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act. The soldier should exercise his own judgement, and unless the actual circumstances are of such a character that he reasonably entertains the belief that the order is one which he is bound to obey, he will be responsible for his act. His mistake must be a mistake entertained in good faith on a question of fact. A mistake of law would afford no protection.[31]
Huda however argued that on principle, ignorance of law should be as good a defence as ignorance of fact, for the one is as effective in negativing mens rea as the other. Both are knowable. If it is difficult for a man in a crowded thoroughfare to avoid treading on another's toes, it is no less difficult for every man to acquaint himself with the laws of the country which he lives. Why then exclude the one and include the other?[32]

Austin explained the two reasons of the rule thus:

(1) If ignorance of law were admitted as a ground of exemption, the courts will be involved in questions, which it were scarcely possible to solve, and which would render the administration of justice next to impracticable.

(2) If ignorance of law were admitted as a ground of exemption, ignorance of law would always be alleged by the party, and the court, in every case, would be bound to decide the point, whether the party was really ignorant of the law, and was so ignorant of the law that he had no surmise of its provisions, which could scarcely be determined by any evidence accessible to others. And for the purpose of determining the cause of his ignorance (its reality
ascertained) it were incumbent upon the tribunal to unravel its previous history and to search his whole life for the elements of just solution.

1. Holmes rejected Austin's theory of expediency which doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into: "The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the law breaker."[34] In fact, reasons given by Austin apply to most if not all defences involving a particular mental state, whether or not amounting to a denial of mens rea. In *Thomas v. R*, Dixon J. said: "A lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from enquiry the most fundamental element in a rational and humane criminal code."[35]

2. Another justification put against mistakes of law as an excuse is the assertion that, "everyone shall be presumed to know the law."[36] This presumption is, in many contexts, no more than another way of stating the rule itself.[37] However today, no one would attempt
to defend such a presumption. Stephen once wrote that the maxim that everyone is conclusively presumed to know the law was a "statement which to my mind resembles a forged release to a forged bond."[38]

It has aptly been said by Edwards: "

"It is perfectly obvious that no single member of the community can be expected to know the existence of every single criminal offence on the statute book, leave alone the mass of offences created nowadays by ministerial regulations."[39]

In one case,[40] Maule J. said that: "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so........If there were not [such thing as a doubtful point of law], there would be no need of courts of appeal, the existence of which shews that judges may be ignorant of law."

Even if the presumption were true, it is only a legal fiction, not a moral justification.[41] It would indeed be damaging to the public image of the law to deny what is so palpably obvious, for contemporary ignorance of the
law is not just amongst laymen, but also police, lawyers and judges. John Austin once wrote:

"To say "that his ignorance should not excuse him because he is bound to know", is simply to assign the rule as a reason for itself."[42]

For this reason it is submitted that the presumption should be abandoned, as having no ground for its existence, and especially not as a justification for the rule that ignorance of the law is no excuse.

In a Malaysian case of **Sulong bin Nain v. Public Prosecutor**[43], the Malayan court of appeal held that "carrying arms" contrary to section 3(1) of the Public Order and Safety Proclamation No:50, 1946, was an offence of absolute prohibition. The Court then proceeded to consider a defence submission that the accused was taking the arms i.e. two hand grenades to surrender them to the police under a mistaken belief that a circular had been issued to the effect that any person delivering arms to the police would be rewarded. It was argued that the defence of mistake under section 76 and 79 of the Penal Code applied. The Court rejected this argument on the
ground that there has been no mistake of fact as these sections required. Willan C.J. said:

"It is clear from the wording of sections 76 and 79 that either of these sections only applies when there is a mistake of fact. A mistake of law does not excuse.......If a person is deliberately carrying arms to the police station there is no mistake as that term is used in jurisprudence. He knows what he is carrying and he is intentionally carrying those arms."[44]

The Court here seems to be suggesting that if the accused had been mistaken as to what he was carrying, he would have been entitled to the defence of mistake. But this is clearly inconsistent with the Court's earlier ruling that carrying arms was absolutely prohibited. If carrying arms is absolutely prohibited then it doesn't matter what the accused thought he was carrying or how unintentional his carrying was. The offence is either one of absolute liability or lack of mens rea will prevent a conviction. The apparently random way in which the maxim has sometimes been applied and sometimes not suggest a simple ad hoc approach to each offence taken by the court.
Another rationale against mistakes of law as an excuse is that it would encourage ignorance where knowledge is socially desirable. It is said that one who shunned knowledge would be better off than he who tried to find out what the law is. It is also feared that "the legislature's handiwork could be flouted indiscriminately, an offender taking care to ensure that he did not make himself cognisant with the law."[45] As Holmes said:

"It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law maker has determined to make men know and obey, and justice to the individual is rightly oughtweighed by the larger interest on the other side of the scales."[46]

According to Matthews,[47] this is one of the many empirical generalisations that courts rely on without adducing evidence for their truth. Why is there no equivalent assumption that excusing defendants for being ignorant of facts encourages them to shun knowledge of the world about them lest they be made liable for doing some harm? In any case, full and actual knowledge of the
law has never been the requirement for conviction, when in relation to facts the law usually accepts recklessness or even negligence as sufficient and liability is made strict in a large number of regulatory offences.

On the other hand, admitting the defence of mistake of law can have the contrary effect of educating the public rather than encouraging them to be ignorant of the law. As Professor Stuart eloquently expresses it:[48]

"It is difficult to see why the general arguments in favour of no liability without some form of fault do not apply. If the criminal sanction is being used as an educative device it should not be at the expense of blameless accused. Furthermore, the publicity attending a trial at which ignorance of the law would excuse would also encourage our law-makers to educate the public, foreigners and immigrants."

It must also be realised that English criminal law sees moral blameworthiness as the foundation of liability. It is grounded on the deliberate or reckless defiance of the
legal rules concerned. In *Brend v. Wood*, for example, Lord Goddard said:

"It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[49]

Since acting under mistake or ignorance of relevant fact negatives moral liability, why is it that mistake or ignorance of relevant law has not generally been recognised to do the same? After all the maxim "actus non facit reum nisi mens sit rea" (that a man is not guilty unless his mind be guilty) is a maxim older than the law of England. When for example duress or mistake of fact is accepted as a defence, the court recognises this because the accused has acted under those circumstances (such as being under duress or mistaken as to the facts). Were it not for those circumstances, surely the accused would have acted differently and lawfully. Why can't the same line of argument be applied to ignorance or mistake of law, for, surely the accused would not have acted as he did had he known the law. The
"floodgates" argument that allowing such a defence would open the door to all manner of excuses cannot unquestionably be accepted for the defect of such an argument is the lack of empirical data to test such a fear.[50] As said by Matthews:

"After all, a person who acts in non-negligent ignorance of the law, and who would have acted differently had he known, is hardly a great social danger. It is true that there is some risk of bad example, but set against the conviction of a morally innocent person this seems negligible."[51]

D. Defence Of Officially Induced Error.

When an accused is charged with having committed a statutory offence, he may raise the following defence: that he was uncertain of his obligations under the statute and took advice from an administrative official whose duties included the administration of the particular statute, and was informed that his act or omission was lawful, or not being certain of his obligations under the statute, took his attorney's or counsel's opinion, and was advised that his act or omission was lawful. What happens under such
circumstances where the accused relied on erroneous information given either by administrative or judicial officers? Surely "the man who does not bother about the legality of his conduct is poles apart from the man who makes an honest effort to behave in conformity with the law but is mistaken or misled."[52]

Currently the law of Malaysia does not recognise officially induced error as a criminal defence. However in the light of recent developments in the doctrine of mistake of law and the newly emerging defence of officially induced error in some jurisdictions, perhaps it is appropriate to ponder over some of the problems that might be faced with reference to the Malaysian penal provision as regards mistake of law.

**CANADA:**

There have been some tentative attempts to develop officially induced error as a defence in Canada, most of which have failed either because of the unreasonableness of the accused or the complete muddle the courts had made of the distinction between a mistake of fact and a mistake of law.
In the case of *R v. Maclean*¹ the defendant had been convicted in Nova Scotia of an offence under section 235(2) of the Criminal Code and had his driver's licence automatically suspended. He was aware of this suspension. At Halifax Airport, where he was employed, a requirement by virtue of the Airport Vehicle Control Regulations, P.C. 1964-1326, was that he should have a valid driver's licence. To ascertain his position, the accused contacted the provincial motor vehicle department and had received erroneous advice of the effect of a suspension within the federal airport property. He was told that it was not necessary to have a licence to drive on government property and all that was needed was permission of his superior. Judge O'Hearn pointed out various colour of right cases and found that section 19 of the Criminal Code is not absolute and cannot be applied without reserve to every situation where the essential mistake is one of law. In this case the defendant had made "a conscientious effort to find out what his situation was." The court then made a distinction between statutes and subordinate legislation, indicating that the defendant had "proved the excuse by preponderance of evidence", and dismissed the Crown appeal against acquittal. This is one of the first cases to be decided in Canada which recognised that it could be
"justification" for commission of an offence when a person acted on bad advice.

In the next case of **R.v.Macphee**[54], the accused was charged inter alia with possession of a restricted weapon, contrary to section 94(b) of the Criminal Code. It appears that the accused had obtained an M-1 rifle with a fold-out butt. This weapon was in fact a restricted weapon within the definition of the Criminal Code. The accused took the weapon to a police post, where he was advised by the constable there that he should have it registered and "if there was anything unusual about the gun no doubt Ottawa would advise". He did this and received back a firearms certificate from the appropriate Federal Government agency. Subsequently he was found in possession of the rifle and charged. The magistrate, citing Maclean and other cases, acquitted on the basis that the accused did not have the requisite mens rea as to the fact that the weapon was restricted. In so doing, he appears to have characterised the error as one of fact, and adopted the traditional approach to the problem. This is a clear case where the court realised the considerable hardship that would result should the mistake be found to be a mistake of law (amounting to no defence) and, accordingly, the mistake is decided to be one of fact. According to Professor Barton:
"......to a casual observer, the error could just as easily have been characterised as one of law, since he was fully aware of what he had but did not realize the legal significance of it. It is not uncommon to find the characterization being used to support an acquittal in circumstances in which the court feels that the accused should not be convicted."[55]

In *R. v. Seemar Mines*[^56^] the Company was charged with making a false or misleading statement in a certificate required to be filed in connection with prospectus, contrary to section 52 of the Securities Act (Ontario). From the evidence, the Company was uncertain as to whether or not it was a "promoter" and thus required to file the requisite information. Evidence also showed that the Securities Commission did have staff available for the purpose of giving advice to mining companies and that the company had been involved in a series of discussions with the Commission as to whether or not it fell within the section. As a result of these discussions, the Company was in at least some doubt as to whether or not it fell within the section, and on this basis the judge decided that there was a reasonable doubt that the Company knew that the material filed was false and misleading. The acquittal of the Company seems to have been based on the traditional approach, i.e., that
the Crown had failed to prove that it had the requisite mens rea. A point to note is that the agency did have an official to whom people looked for advice and in this case the company had acted upon the advice received.

Officially induced error can also arise in situations where the accused had relied on a prior decision of a court which is later revised by the court itself or overruled by a superior court.

In the case of *R v. Campbell and Mlynarchuk*[^57] a dancer in question had relied on a statement of law related to her by her agent. As it turned out, the advice was wrong, temporarily at least, because the case on which the agent purported to rely was subsequently appealed and the decision reversed. Interestingly, the Supreme Court of Canada reversed this decision and acquitted and, in a sense, the advice that had been given turned out to be right in the long run.

In the case of *Dunn v. The Queen*[^58] the accused was charged with failing to comply with a lawful demand for breath samples under section 235(2). On appeal, one of the points raised was that Dunn had a reasonable excuse
for failing to give the sample because he had not been afforded the chance to consult his lawyer in private. There was some suggestion that Dunn had called his lawyer over the phone and had been advised not to give the sample because he was not being given the privacy to talk to his lawyer as required by the then leading cases. As it turned out however, the advice tendered, though accurate at the time it was given, turned out to be an error at the subsequent date of the trial as a result of the case of Jumaga v. The Queen.[59] The appellate court decided that the facts did not support the argument based on reliance on prior judicial decisions and even if they had, Mr. Justice Macdonald indicated:

"Consequently, even if the appellant had been advised by [his lawyer] to refuse to provide a sample of his breath on the ground that he was not afforded the Doherty kind of privacy in making the telephone call, such would have been a mistake of law on the part of [the lawyer] and would not afford a defence to the charge at trial after the judgement in Jumaga was pronounced."

The case was severely criticised on this point. As said by Professor Barton:
"This is one place where characterization of the error as one of law is probably accurate but in which the equities seem to support an acquittal."

In *R v. Hammond* [60] a police officer in a motor vehicle, responding to a call, came to a stop sign, followed exactly the procedures outlined in the instructions he had received in writing from his superior officers and proceeded through the intersection where he was involved in a motor vehicle accident. He was charged with failing to yield the right of way and in addition to raising the defence of necessity, argued a defence of officially induced error. The instructions upon which he purported to rely were instructions given to all police officers by the Chief officer, and these had the approval of the Police Commission. It was argued that even if those instructions were legally incorrect in the sense that a person following them might commit an offence under the Highway Traffic Act, it was reasonable under the circumstances for the officer to have relied upon them and he should be acquitted. McCart, J., set aside conviction and ordered a new trial. Unfortunately, no reference in the reasons for judgement was made to the argument concerning officially induced error.

The doors to the consideration of officially induced error as a defence were more fully opened in a customs
In the case of R. v. Walker and Somma[61], in that case, rather than seeking any advice, the offenders failed to report possession of a diamond to customs officers on their own mistaken belief that it was not necessary to do so. However it is interesting to note Mr. Justice Martin's remark:

"I would not wish to be taken to assent to the proposition that if a public official charged with responsibility in the matter led a defendant to believe that the act intended to be done was lawful, the defendant would not have a defence if he were subsequently charged under a regulatory statute with unlawfully doing that act. .......I leave aside that difficult question until it is necessary to decide it. Suffice it to say that no suggestion arises in this case that the respondents were misled by custom officials."

In Molis v. The Queen[62], there seemed to have been an attempt at checking the development started by Mr. Justice Martin's decision. In this case, the accused was charged with trafficking in a registered drug contrary to section 42(1) of the Food and Drugs Act, R.S.C. 1970, as a result of his operation of a laboratory which manufactured a drug M.D.M.A. When the accused first
began manufacturing M.D.M.A. it was not a restricted drug but in June 1976, it was added to Sch. H to the Act by a Regulation published in the Canada Gazette. The accused was arrested two months later and the charge related solely to that two month period. Mr. Justice Lamer expressly disapproved of the defence found to exist in the case of R. v. Maclean[63] The court pointed out that due diligence relates to the "fulfillment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation."[64]

The judgement in Molis, strict as it is, cannot be taken as a bar to the defence of officially induced error. Molis was in fact ignorant of the introduction of the newly published drug schedule and having indulged in an activity requiring special knowledge defence of ignorance of the law was not open to him.

Furthermore, two years later in the case of R. v. MacDougall[65], without referring to Molis, the same court expressly left open the defence of officially induced error. In this case, the accused was convicted of driving a motor vehicle while his licence to do so was cancelled contrary to a provincial act. Following his
conviction he was sent an "Order of Revocation of Licence" by the Registrar of Motor Vehicles, but when he appealed this conviction, he was sent a "Notice of Reinstatement" by the Registrar. Later when his appeal was dismissed, the accused was informed by his lawyer. It was provided under the provincial Act that upon dismissal of an appeal, a drivers licence is automatically revoked. A month later the accused was stopped driving on the very day he later received a second "Order of Revocation of Licence." He testified that he believed he could drive until he was notified by the registrar.

Mr. Justice Macdonald concluded that even if the offender's error were one of law, the accused could rely on the defence of officially induced error:

"Assuming however that the error of the respondent as to the revocation was one of law I am prepared to say that the facts as found by the trial judge give rise to a defence of justification based upon reliance by the respondent on a previous course of conduct on the part of the registrar. This defence might be classified as officially induced error or perhaps as a form of colour of right."[66]
He further added:

"The defence of officially induced error has not been sanctioned, to my knowledge, by any appellate court in this country. The law, however, is ever changing and ideally adapts to meet the changing mores and needs of society. In this day of intense involvement in a complex society by all levels of government with a corresponding reliance by people on officials of such government, there is in my opinion, a place and need for the defence of officially induced error, at least so long as a mistake of law, regardless how reasonable, cannot be raised as a defence to a criminal charge."[67]

NEW ZEALAND:

In the case of Maintenance Officer v. Stark[68], the respondent had been prosecuted pursuant to section 107(1) of the Domestic Proceedings Act 1968 (N.Z) for failing to pay maintenance under a maintenance order. He admitted his failure to make payments but said he had been advised by his solicitor that as from the signing by him of a consent to the adoption of such child by the child's
mother and her new husband he was no longer obliged to pay maintenance. On appeal the Supreme Court upheld the dismissal of the information by the magistrate on the ground inter alia that the respondent's mistake was as to the civil law, namely his responsibilities under the Domestic Proceedings Act, and consequently provided an excuse.

The defence of officially induced error has however been upheld in New Zealand in a decision of the District Court in Department of Internal Affairs v. Nicholls\[69\]. The case involved a prosecution under the Wildlife Act 1953 relating to allegations that the defendant had protected wildlife (stuffed birds) in his possession, without lawful authority. The essence of the defence argument was that the defendant had acted upon lawful advice given by Wildlife Officers within the Department relating to his ability to possess certain protected wildlife species. In the event the advice given by the Department was mistaken because the Department had overlooked an earlier statute. Bradford D.C.J. said:

"Now ignorance of law is no excuse but a mistake of law, reasonably held, is a defence and in my view of the matter the defendant, as a result of the correspondence he entered into with the Department, and the advice he got,
finished up with a situation where he was mistaken as to the law and its fairly Draconian provisions as to what a person can and cannot do with absolutely protected wildlife and for those reasons he had a reasonable belief and a mistaken view of the law and I cannot find the charges proved against him."

From this brief survey, it is clear that officially induced error has gained recognition as a distinct ground of exculpation within the jurisprudence of mistake of law. In Canada its future seems assured although its parameters have not yet been fully defined. In New Zealand, although the doctrine is still in its infancy, there is clearly scope for the development of officially induced error, as a separate ground of defence.

The principles emerging from the case law seem to suggest that the defence may be available when the following minimal conditions are satisfied:

(1) The mistake as to the person's obligations under penal law is reasonably held.
(2) The person has acted in direct consequence of the advice of an official which purports to be definitive as to the relevant law.

(3) The advice given was specific and unequivocal. It is submitted that where these minimum conditions are capable of being satisfied a defendant ought to be allowed to plead officially induced error in any situation where it is reasonably open on the facts, regardless of the principle ignorantia juris.

E. Conclusion

Lord Esher M.R. once observed that "maxims are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."[70] Though maxims used to be regarded as inflexible and comprehensive rules of law to be applied strictly regardless of the reasons upon which they were based, it would be timely now to seriously ponder the extent of the validity of the maxim "ignorance of the law is no excuse". Keedy has aptly said:

"......when a body of law has grown up around a maxim, it is desirable to ascertain the extent to which the
decisions are based upon legal reasoning and analogy, and the extent to which they have been influenced by the maxim as such."[71]

Modern courts and text writers too attach much less importance to maxims; for the experience of centuries has proved the inapplicability of maxims in many instances and their too extensive scope in others. Hall has observed:

"These maxims enter the arena of criminal law theory as roaring lions in occupation of a vast terrain. After drastic reduction in current text and case law they make their exit as timid, shorn lambs. The typical taking of the numerous "exceptions" to both doctrines leaves a series of narrow, disorganised rules whose general significance can hardly be discerned."[72]

We have seen the proper development of the law in relation to mistakes of fact. The court must therefore be brave enough in taking steps to ensure development in relation to mistake of law, for the problems posed do in fact question certain fundamental principles of criminal jurisprudence.
NOTES

1. In New Zealand, Section 25 of the Crimes Act 1961 states: "The fact that an offender is ignorant of the law is not an excuse for any offence committed by him."

In Canada, Section 19 of the Criminal Code of Canada (R.S.C. 1970, c. C-34) provides as follows: "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence."

2. F.M.S. Cap 45.


4. Hale 1 P.C. 42.


7. (1943) AIR Pat. 64.


11. (1921)23 N.L.R. 33.

11a. P. Matthews, " Ignorance of the law is no excuse?" in 3 Legal Studies p. 179.


13. Matthews, op.cit. 179

14. (1800) Russ.& Ry. 1

15. (1852) Dearsly 51.

16. Id. 59

17. Section 378 of the Penal Code:

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft."

18. (1963) A.C. 160

19. Id. 175-176

20. Ibid at p.171


22. Lim Chin Aik, supra, at 171

23. Matthews, op. cit. 181


25. Hyman Gross "A Theory of Criminal Justice" at p. 269

26. Ibid.

27. F.M.S. Cap 45

28. 3 B.and S. 576, at p. 578
29. Ibid.

30. see infra footnotes (24), (25), (26), (27), (28), (29) and (30)

31. Charan Das (1950) 52 P.L.R. 331


33. Austin, Jurisprudence, Vol. 1, 489


35. (1937) 59 CLR 279 at 309

36. Brett v. Rigden (1568) 1 Plow 340 at 342


40. Martindale v. Falkner (1846) 2 CB 706


42. Lectures on Jurisprudence (5th edn. 1885) vol.1 p. 482

43. [1947] MLJ 138

44. [1947] MLJ 138, atp. 141.

46. Ibid.

47. Ibid., Matthews op. cit. p. 187


49. (1946) 62 TLR 462 at 463

50. see the comments of Barwick C.J. in R v. O'Connor (1979), A.L.R. 449 Aust. H.C. concerning the floodgates argument as it relates to the defence of intoxication.

51. Matthews, op. cit. p. 191


53. (1974), 27 C.R.N.S. 31

54. (1975), 24 C.C.C. (2d.) 229

55. P.G.Barton "Officially Induced Error as a Criminal Defence: A Preliminary Look"

56. (1974), C.C.C. (2d.) 54

57. (1972), 10 C.C.C. (2d) 26

58. (1977), 21 N.S.R.(2d) 334

59. (1976), 29 C.C.C. (2d) 269

60. (1979), 1 M.V.R. 210

61. (1980), 51 C.C.C. (2d) 423
62. (1980), C.C.C. (2d) 137

63. op. cit.

64. op. cit. at p. 564 C.C.C.

65. (1981), 60 C.C.C. (2d) 137

66. Ibid. at p. 158

67. Ibid. at p. 160

68. [1977] 1 N.Z.L.R. 78


70. **Yarmouth v. France** (1887) 19 Q.B.D. 647, 653.

71. Edwin R. Keedy, "Ignorance and Mistake in the Criminal Law" p.76.

BIBLIOGRAPHY.

BOOKS.

Atchuten Pillai, PS, Criminal Law (6th edn, 1983) Tripathi Pte Ltd.


Gour, HS, Penal Law of British India (5th edn, 1936) Law Publishers

Gour, HS, Penal Law of British India (10th edn, 1983) Law Publishers


Lacey, N, Wells, C and Meure, D, Reconstructing Criminal Law, (1990), Weidenfeld and Nicolson.


McCall Smith, RAA and Mason JK, Law and Medical Ethics (1983) Butterworths.


Murphy, P, Blackstone's Criminal Practice, (1992), Blackstone Press Limited.


ARTICLES.

Alldridge, P., "Mistake in Criminal Law - Subjectivism Reasserted in the Court of Appeal", Northern Ireland Legal Quarterly Vol. 35, No. 3 [1984], 263.


Brudner, A., "Imprisonment and Strict Liability", University of Toronto Law Journal


Galloway, D. "Why the Criminal Law is Irrational", University of Toronto Law Journal


Kastner, N.S. "Mistake of Law and the Defence of Officially Induced Error", Criminal Law Quarterly


Lewis, T.J. "Recent Proposals to the Criminal Law of Rape: Significant Reform or Semantic Change?", Osgoode Hall Law Journal Vol. 17, No. 2 [1979], 445.


Matthews, P., "Ignorance of the law is no Excuse?", Legal Studies


Williams, G., "What should the Code do about Omissions?", Legal Studies

**TABLE OF CASES**

Abdul Kareem (1972) Cri. LJ (Mys).


Anthony Samy v PP (1956) 22 MLJ 247

Ayavoo (1966) 1 MLJ 242.


Balint, United States v., 258 US 250 (1922).

Barronet, In re. (1952) Dearsly 51.

Beaver (1957) 118 CCC 129.


Bishop, R.v. (1880) 5 QBD 259.

Bonda Kui (1943) AIR Pat. 64.


Brett v. Rigden (1568) 1 Plow 340.
Charan Das (1950) 52 PLR 331.
Cheow Keok v. PP [1940] MLJ 30
Cherokee Disposals & Construction Ltd., R.v., (1973) 13 CCC (2d) 87 (Ont. Prov. Ct.).
Chiswibo (1961) 2 SA 714.
Church, R.v., [1965] 2 All. ER 72.
Civil Aviation Dept. v. Macenzie [1983] NZLR.
Cunningham, R.v. [1957] 2 All ER 412.
Dunn v. The Queen (1977) 21 NSR (2d) 334.
Gammon (Hong Kong) Ltd. v. A.G. of Hong Kong [1984] 3 WLR 473.
Harding v. Price (1948) 1 KB 695.
Hobbs v. Winchester Corp. [1910] " KB 471.
Hussain, SN (1972) SCC (Cri) 254.
Ianella v. French (1968) 119 CLR 84.
Instan, R. v., [1893] 1 QB 450.
Internal Affairs v. Nicholls (Unreported) 20 May 1986 (CR 500 40 34 002-025) N.L. Bradford D.C.J.
Jumaga v. The Queen (1976) 29 CCC (2d) 269.
K. Moideen (1959) Ker. 146.
Kat v. Diment (1951) 1 KB 34.
Lai Tin v PP [1939] MLJ 248
MacDonald, R.v. (1983) 3 CCC (3d) 419.
Macphee, R.v. (1975) 24 CCC (2d) 229.
Mah Kah Yew v PP [1971] MLJ 1
Martindale v. Falkner (1846) 2 CB 706.
Mc Donagh [1974] 2 AER 257.
Molis v. The Queen (1980) CCC (2d) 137.
Nedrick, R. v., [1986] 3 All ER 1.
Nidamurti Nagabhushanam (1872) 7 MHC 119.
Phekoo, R.v., [1981] 2 All ER 84 (CA).
Pittwood, R. v., (1902) 19 TLR 37
Prince, R.v. (1875) LR 2 CCR 154.
Proudman v. Dayman 67 CLR 536 (Aust) 1941.
R. v. K. (1971) 3 CCC 2d. 84.
Reynolds v. G.H. Austin & Sons Ltd. [1951] 2 KB 135.
Roper v. Taylor's Central Garages Exeter Ltd.(1951) 2 TLR.

Seymour (1983) 76 Cr. App. R. 211.
Shepherd v. Nottidge (1862) 9 Cox CC 123.
Shepherd, R.v. [1980] 3 All ER 899.
Sherras v. De Rutzen [1895] 1 QBD 918.
Shorty (1950) SR 280.
Simon Fraser (1878) 4 Couper 70.
Sinnathamby [1956] MLJ 36.
Strasser v. Roberse (1979) 103 DLR (3d) 193.
Teo Eng Chan & Others, P.P.v., [1988] 1 MLJ 156.
Thabo Meli, R.v., [1954] 1 All ER 373.
Thomas v. R. (1937) 59 CLR 279.
Tolson, R.v., (1889) 23 QBD 168.
Tustipada Mandal [1950] Cut. 75.
Weerakoon v. Ranhamy (1921) 23 NLR 33.
Woo Sing & Sim Ah Kow v R (1954) 20 MLJ 200
Woodrow, R.v. 15 M&M 404 (Exch) 1846).
Yarmouth v. France (1887) 19 QBD 647.