WORKING PAPER 2

STRICT LIABILITY

*Brian Hogan**

When William Prince met Annie Phillips in the yard behind the Fighting Cocks public house in Reading on the 3rd of January, 1875 and took her off to Oxford, he could hardly have known what he was letting himself, and the rest of us, in for. There is no record of what Annie's dad said when he caught up with them among the dreaming spires (presumably it would have contained a number of expletives which we would have had to delete), but we do know what William said when he was arrested for the abduction of Annie. It was that he thought that Annie was over sixteen, and all the evidence pointed to the conclusion, notwithstanding that Annie was a mere thirteen years old at the time of the alleged offence, that William's belief was a perfectly reasonable one.

It is permissible to wonder whether William would have been alarmed or merely amused at the consequences his case [1] (for his was the decisive case) was to have on the development of the criminal law. Most likely he would just be bewildered by it all as he must have felt bewildered that day the Lord Chief Justice of England, the Lord Chief Baron and fourteen judges of the Queen's Bench, Exchequer and Common Pleas divisions of the High Court [2] gravely passed upon the question whether his belief that he was free to go for a romp with Annie constituted a defence to a charge of abduction contrary to section 55 of the Offence against the Person Act 1861. [3] We all know that the Court for Crown Cases Reserved held, by the impressive majority of 15 to 1, that it did not, and William had his conviction for abducting Annie affirmed.

I can own that I have shared William's bewilderment from the time I first heard of his fate from my teacher (a most delightful and urbane man, by the way, who went on to vastly more important things than teach criminal law), since I could not see, and ever since have failed to see, quite what purpose was served by convicting Prince of abduction. As I recall, his (my teacher's) explanation was that the purpose of the statute was to save young girls from themselves, which is as good an explanation as any I have heard but, like all the explanations and justifications that have been ad-

* LL.B. of Gray's Inn, Barrister, Professor of Law, University of Leeds.

[1] R. v. Prince, L.R. 2 Cr. Cas. Res. 154, 11 Cox Crim. Cas. 193 (1875).

[2] From these three divisions the only absentees were the Chief Justice of the Common Pleas Division, Lord Coleridge, and Huddleston B.

[3] 24 & 25 Vict. c. 100.

vanced in defence of strict liability, it does not bear scrutiny. Annie had no wish to be saved from herself (she told William that she was eighteen) and while we may be able to save girls from deliberate, reckless, or even negligent, abduction, there is nothing that can be done to save them from a genuine mistake. The courts recognised this fact in abduction cases where a genuine and reasonable mistake was made by inflicting only a nominal penalty. [4]

And what purpose was served by the conviction? Would it serve as a warning so that Prince would not make the same mistake again? It certainly seems logical to assume that Prince was thereafter more circumspect in his dealings with young women, but the Court for Crown Cases Reserved said he was to be liable *no matter how careful he was.* There is no known way of teaching a man not to make a reasonable mistake a second time.

Prince, however, involved a "serious" crime punishable by imprisonment and, on the whole, strict liability is more commonly reserved for "regulatory" offences where the fine is the normal penalty. Here, it is said, strict liability is more obviously defensible. Protagonists claim that, without the imposition of strict liability, the enforcement of the law would be severely handicapped and that strict liability simplifies law enforcement and means that trials can be conducted speedily and cheaply. There is no need for me to rehearse the countervailing arguments—these are comprehensively documented in the Law Reform Commission's Working Paper 2—but I do wish to deny, and deny emphatically, that strict liability ever led to a simplification of the law. In England, and the position is no better in Canada, there is no discernible pattern even within the field of regulatory offences which enables the ordinary lawyer to predict with any measure of confidence whether a particular offence will be held to be one of strict liability or not. Few areas of the criminal law have spawned so much litigation and so little of it is edifying.

I suppose, though, that this objection might be met by more precise drafting or by expressly labelling certain offences as offences of strict liability. But my objection would still remain, and I can do no better than illustrate it by reference to the recent decision of the House of Lords in *Alphacell Ltd. v. Woodward.* [5] Under section 2(1) of the Rivers (Prevention of Pollution) Act 1951, [6] it is an offence if a person "causes . . . to enter a stream any poisonous noxious or polluting matter . . ." and it was held that the appellants had been properly convicted where effluent overflowed from their settling tanks into a river. The overflow was attributable to the blockage of certain pumps by debris brought down by the river but it was held that, even assuming the appellants had not been negligent, they were guilty of the offence because their operations had caused the effluent to enter the stream. The

[4] Prince was directed to come up at the next (Kingston) assizes for sentence where (presumably) some nominal sentence was imposed.

[5] [1972] A.C. 824.

[6] 14 & 15 Geo. 6, c. 64.

House of Lords took the view that Parliament intended the offence to be one of strict liability; it belonged to that class of acts "not criminal in any real sense, but . . . which in the public interest are prohibited under a penalty." [7]

This is a conclusion I find difficult to accept. I rather like rivers and I have a definite preference for clean rivers over filthy ones. Indeed, I would go so far as to say that polluting rivers is more clearly anti-social, more difficult to defend, than, say, shoplifting, and no one has ever suggested that shoplifting should be a crime of strict liability. The pollution of rivers was likened by the House of Lords to nuisance; to me it is more nearly likened to an offence of damage or mischief to property.

Whether those in control of the affairs of Alphacell Ltd. had ever heard of the doctrine of strict liability is problematical but what *is* known is that they strongly resented the conviction of the company. The magistrates who heard the case had imposed a fine of £20 which is more or less nominal and indicates that they did not take a serious view of the matter. Since it is a very expensive business to take an appeal to the House of Lords, it might have been expected that Alphacell would have let the matter rest there. So I took the liberty of telephoning Alphacell's solicitors to ask why they were throwing so much good money after so little bad. The answer was that the directors of Alphacell were smarting under a sense of injustice. They saw no reason why the company should be convicted of an offence when, as they viewed it, they had done all that could be reasonably expected of them to prevent its commission. No more do I.

It follows from this rambling testament that I wholly approve of the general views expressed by the Law Reform Commission in Working Paper 2: *The Meaning of Guilt.* In some respects I think I might be inclined to go further. I am not convinced that the whole answer lies in replacing strict liability by liability based on negligence for regulatory offences, and I am even less happy about placing the onus of disproving negligence on the defendant. The argument runs that while mens rea (in the sense of intention, knowledge or foresight) is appropriate for "serious" crime, or crimes *mala in se*, it is not necessarily appropriate for "regulatory" offences, or crimes which are merely *mala prohibita.* I have never been entirely happy with this distinction. I have already indicated that I regard polluting rivers (*malum prohibitum*?) as more serious than shoplifting (*malum in se*?), and I similarly take a dim view of selling food unfit for human consumption, using false measures and false advertising, though all of these are traditionally regarded as *mala prohibita.* The point is made in Working Paper 2 [8] that a deliberate or reckless infraction, even in the case of a regulatory offence, may merit condign punishment where a merely negligent infraction would not. I respectfully agree, but I see a danger that, once negligence is made

[7] Sherras v. De Rutzen, [1895] 1 Q.B. 918, at 922 (per Wright, J.) quoted with approval by Viscount Dilhorne, *supra* note 4, at 839, and by Lord Salmon, *id.* at 848. To the same effect is Lord Pearson, *id.* at 842-43.

[8] LAW REFORM COMMISSION OF CANADA, STRICT LIABILITY: THE MEANING OF GUILT, WORKING PAPER 2 at 37 (1974).

the touchstone of liability, the prosecution will rarely trouble itself with proving more. The negligent are then lumped together with the callous, and the real villians are never singled out.

This leads to a larger issue which is again touched upon in Working Paper 2,[9] and pursued a little farther in the Commission's paper, *Studies on Strict Liability*.[10] This is that the legislature's response to the many social problems that modern society spawns is often an unthinking one. The typical response is to make a crime of the particular mischief and then to pass the buck to the already overburdened agencies of law enforcement. New crimes are created with an almost reckless abandon and scattered about the statute book like confetti.

When we are dealing with many-sided activities such as the marketing of food, the regulation of commercial practices, fishery conservation or what-have-you, the simplistic response of crime and fine may not be just good enough. Government departments—for tasks of this kind are well beyond the resources of any law reform commission—must think longer and harder about the appropriate solutions to the problems which fall within their bailiwick. Only as a last resort should the criminal law be used to secure the observance of proper standards for the good of all. "Preventive justice," as Lord Chief Justice Coke once put it, "is better than punishing justice."

There is, then, a long way to go yet. It is, however, important to be pointed, as I believe Working Paper 2 points us, in the right direction, even if it means facing into the prevailing wind.

---

[9] *Id.* at 31-32.

[10] LAW REFORM COMMISSION OF CANADA, STUDIES ON STRICT LIABILITY 145-47 (1974).