STRICT LIABILITY OFFENCES: ARE THEY NOT IN CONFLICT WITH THE PURPOSE OF SENTENCE AND CONSTITUTIONAL EXPECTATIONS?

Mini-dissertation submitted in partial fulfilment of the requirements for the degree of Masters of Laws in the faculty of Law at the North-West University (Mafikeng Campus)

by

Ditaba Petrus Rantsane

Student No: 22599703

LLB (Vista University)

Study supervisor: Dr F Khunou

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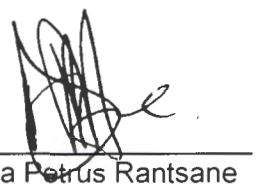
DEDICATION

This mini-dissertation is dedicated to my late grandmother Alina Motaung, my mother Selina Makoaba, my wife Keabetswe Rantsane and my daughter Palesa Molelekwa.

DECLARATION

I duly declare that the mini-dissertation for the Degree of Masters of Law (Generic) at the North West University (Mafikeng Campus) hereby submitted has not been previously tendered by me for a degree at this institution or any other University. I further declare that this mini-dissertation is my own work in design, structure and execution and that all materials and sources contained herein have been acknowledged.



Ditaba Petrus Rantsane

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Keywords: strict liability: Constitution; apartheid; punishment; colonialism; *mens rea*; transformative constitutionalism; crime; colonial regime; vicarious liability; common law; defamation; racial segregation; public welfare offences; *actus reus*; due diligence; regulatory offences; fundamental rights; sanctions; retributive theory; reformative theory; preventive theory; deterrence theory; sentence; minimum sentence; restorative justice; guilty mind; fault

Aim of the study: The intention of this study is, generally, to show that strict liability has no place in a democratic society based on human dignity, equality and freedom, as it undermines the purpose of sentence and, more importantly, the spirit of the Constitution. The main objective is to make recommendations to the Constitutional Court regarding the uncertainties surrounding the constitutionality of strict liability offences. This will, hopefully, lead to this principle being declared unconstitutional.

Research procedure and methodology: Various methods will be used to achieve the aim of this research, including extensive reading and critical analysis of books, journal articles, internet sources and reported cases on the topic. In addition, the approach of foreign legal systems to strict liability offences will be explored in order to establish whether such systems offer us guidance on how to deal with strict liability offences without contravening the provisions of the Constitution.

Conclusion and recommendations: As with other countries, strict liability offences are part of South African criminal law, with fault or *mens rea* forming an integral part of our criminal justice system. In the past it was accepted practice that *mens rea* should be proved beyond reasonable doubt before a person could be found guilty of a crime. This was the position until the introduction of strict liability offences into English law during

the 19th century. This introduction brought about a dramatic change in perspective, with *mens rea* forming an important element of criminal liability.

This controversial development in the law was met with two opposing opinions, that is, those in favour of this practice and those against it. The argument in favour of strict liability was to the effect that these are statutory offences and not real criminal offences, and, as such, they are only invoked for public welfare offences. They further argue that strict liability offences attract lenient sentences. The critical response to these justifications has been that the distinctions between sanctions for acts which are morally wrong and prohibited by law do not change the fact that the sanctions are criminal in essence and that criminal sanctions without blameworthiness have little support in either deterrent or retributive theory.

The opposition to strict liability arose in South Africa as far back as the 1970s with the Viljoen Commission enquiry into the South African penal system. Since the inception of strict liability, the law has evolved, with the South African legal system changing from Parliamentary sovereignty to constitutional supremacy. The effect of the change has been that the law practised in South Africa is supposed to be aligned with the Constitution. The Constitution has also authorised courts, when developing the common law or interpreting statutes, to consider international and foreign law. Accordingly, consultation has taken place with other countries on the way in which they approach strict liability offences.

The research revealed that there are similarities in the criminal law approaches of all the countries consulted in that they all have a high regard for the element of *mens rea*. However, there is also an acceptance that the introduction of strict liability is necessary to protect people from harm. Courts from these countries are of the view that it should not be left up to them to interpret whether the legislature requires the offence to be strict liability or not. Consequently, they prefer the legislature to make its intentions clear on the statute. This study shares the view of Snyman that the principle of strict liability will not pass the constitutional muster. The argument held by this study is that strict liability infringes on the right to remain silent, the presumption of innocence, privilege against self-incrimination and the right to a fair trial, as enacted in the Constitution.

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LIST OF ABBREVIATIONS

A

AA	Aliens Act
AD	Appellate Division
AG	Attorney General

B

BOR	Bill of Rights
BCMV	British Columbia Motor Vehicle Act

C

CSC	California Supreme Court
CA	Cape Act
CA	Children Act
CJ	Chief Justice
CLA	Civil Liberties Australia
C	Constitution
CC	Constitutional Court
CPA	Criminal Procedure Act

D

DPP	Director of Public Prosecutions

F

FCP	Fauna Conservative Proclamation

I

IPC	Indian Penal Code

N

N	Natal
NP	National Party
NSWLRC	National South Wales Legislation Review Committee

S

SIO	Singapore Immigration Ordinance
SA	South Africa
SC	Supreme Court

CHAPTER 1: INTRODUCTION

1.1 *BACKGROUND PERSPECTIVE*

The primary objective of this study is to discuss and explore the landscape of strict liability offences in South Africa. The term "strict liability" means liability in respect of which the requirement of culpability is dispensed with.[1] This discussion falls within the ambit of criminal law. Criminal law is defined as a branch of the national law that identifies certain forms of human conduct as crimes and provides for the punishment of those persons with criminal capacity who unlawfully, and with guilty mind, commit crime.[2]

Strict liability tends to be used for those offences for which the focus is on the act rather than the actor. Hence, the element of *mens rea* is totally disregarded. This study will discuss, among other things, the background to these offences. It will also be demonstrated how incompatible strict liability is with the law of sentencing. Subsequently, the implications of transformative constitutionalism on strict liability will be explored.

1.1.1 Colonial rule

Strict liability offences originated in Anglo-American criminal law during the middle of the nineteenth century.[3] This concept of strict liability made its appearance in South Africa around 1868,[4] where it was adopted and reproduced from the English statutes.[5] There are conflicting arguments as to the origin of strict liability offences, with one group of authors alleging that they were created by statutes and were therefore unknown to the common law.[6] A conflicting view states that common law had strict liability.[7] According to Demetriou-Jones:

> Strict liability offences were originally made in order to help business related offences to be punished. This may have came from the 19th century during which the industrial revolution, where factory workers were subject to abuse,

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[1] For these offences the society is concerned with the prevention of harm, rather than punishment for overtly wrongful act. The offences are the ones that are said to be against public welfare for instance, environmental offences and traffic offences. See in this regard Burchell *Criminal law* 546.
[2] Burchell *Criminal law* 1.
[3] Burchell *Criminal law* 549
[4] Burchell *Criminal law* 549.
[5] Burchell *Criminal law* 548.
[6] Snyman *Criminal law* 242.
[7] Akpotaire 2007 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%AND%20THE%20NIGERIAN%20CRIMINAL%20CODES%20A%REVIEW (10 September 2010).

> rarely being punished for it, as it was hard to prove *mens rea* on the factory owner's part, resulting in few successful prosecutions.[8]

1.1.2 Apartheid regime of strict liability

The issue of racial segregation in South Africa began during the colonial era. However, it was legalised by the National Party after the 1948 elections when the apartheid system was invented as an instrument to oppress and discriminate against people of other races. The apartheid era also marked a significant change of attitude towards strict liability offences in South Africa with the concept being applied until the 1950s when it was met by uncompromising hostility from the courts,[9] whereupon the application of strict liability decreased significantly. However, the concept was not exterminated but remained available for application where necessary up to today.

In *S v Coetzee,* O'Regan J quoted another opposition to strict liability offences that emerged in 1976 during the apartheid regime from the Viljoen Commission's report.[10] The report held the following:

> In spite of the recognition in certain legal systems of the so called strict liability offences, this commission remains impenitent and adamant in expressing the view that strict liability offences cannot be justified in the criminal law. If the "offender" unwittingly commits an act under circumstances which totally absolve him from any blame, what is the object in punishing or even penalising him? There would, in the commission's view, be no sense in doing so.[11]

1.1.3 New Constitutional dispensation

The post-1994 democratic order brought about a significant change to our legal system. The interim Constitution and the final Constitution were instrumental in introducing democratic principles and constitutional relief.[12] Accordingly, the Constitution was the instrument used to measure the compatibility of all laws and

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[9] Burchell *Criminal* law 549. In S *v Qumbella1966 (4) SA 356 (A)* at *364* Holmes JA held that: "The basic principle is that *actus non facit reum, nisi mens sit rea.* Current judicial thinking is recognising more fully the scope and operation of this fundamental rule of our law ... Of course the lawmaker has it within its power to override this fundamental principle of fairness, and to make absolute the duty of compliance with its behes. Demetriou-Jones 2007 http://www.associatedcontent.com/article/2736259/strict-liability-offences.htmlts, thus rendering innocent violations punishable. But such an inroad into individual freedom should be made to appear very plainly, so that he who runs may read."

[10] *S v Coetzee* (1997) 3 SA 527. The report on the penal system of the Republic of South Africa (1976) at para 5.1.2.82.

[11] *S v Coetzee* (1997) 3 SA 527 para 164.

[12] Interim Constitution Act of 1993 and the Constitution of the Republic of South Africa Act of 1996.

legislation enacted in the pre-democratic era with acceptable democratic principles. Thus, all laws are subject and subordinate to the Constitution and must conform to it. Section 2 provides that the Constitution is the supreme law of the country and that every law or conduct inconsistent with it is invalid.[13] Thus, Snyman posits that there is uncertainty as to whether strict liability offences are compatible with the Constitution because of its nature of excluding the element of *mens rea*..[14]

1.2 *AIM OF STUDY*

The aim of this study is to analyse the system of strict liability offences in South Africa, thereafter the constitutionality or otherwise of these offences will be determined. This study will also undertake to investigate the theories of punishment and the relevance of such theories to strict liability offences. The study will also provide a critical analysis of the approaches of foreign legal systems to strict liability offences. It is further the purpose of this study to explore and investigate the feasibility of the application of strict liability offences in a new constitutional era. This study will be undertaken with a view to making suggestions and recommendations for applying the concept of strict liability effectively if it passes the constitutional muster.

1.3 PROBLEM STATEMENT

The coming into operation of the Constitution certainly had a major influence to our legal system. It encouraged the court when interpreting the Bill of rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It further emphasizes the importance of promoting the purport and objects of the Bill of Rights when interpreting any legislation, and developing the common law or customary law.[15] The main concern is whether strict liability offers the accused a fair trial as guaranteed by the Constitution?

It is obvious that upon conviction the sentence will follow. An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of

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[13] Constitution of the Republic of South Africa Act of 1996 Hereafter referred to as the 1996 Constitution.
[14] Snyman *Criminal Law* 246.
[15] 1996 Constitution 39.

the offender; in other, words, the sentence should reflect the blameworthiness of the offender, or be in proportion to what is deserved by the offender.[16] The strict liability offences totally disregard the fact that the offender did not have a guilty mind. It is based on such disregard of the state of mind of the offender that I wonder whether the purpose of punishment will still be fulfilled by the punishment that followed the conviction under such circumstances.

1.4 RESEARCH METHODOLOGY

A considerable number of methods will be followed to investigate the relevant issues of this study. These methods include extensive reading and critical analyzes of books, journal articles, information from the internet and reported cases on the topic. The research adopts a qualitative approach. The approach of foreign legal systems to strict liability offences will also be explored.

[16] Terblanche SS 1999 The *guide to sentencing in South Africa* 153.

CHAPTER 2: BACKGROUND TO THE STRICT LIABILITY OFFENCES

2.1 INTRODUCTION

This study deals with the background to strict liability offences, as it is of the utmost importance to look at the origin and history of the strict liability principle in order to fully comprehend its origin. The study will further explore the contribution that both the colonial and the apartheid regimes made to the application of strict liability offences in South Africa.

According to Snyman, strict liability offences were created by statute and are therefore unknown in the common law.[17] On the other hand, it is argued to the effect that even common law had strict liability offences.[18] There is a presumption that *mens rea*, an evil intention, or knowledge of the wrongfulness of the act, is an essential ingredient in every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals; accordingly, both must be considered.[19]

2.2 THE ORIGIN OF STRICT LIABILITY OFFENCES

As indicated earlier, in statutory crimes strict liability originated in the Anglo-American criminal law during the middle of the 19th century.[20] This tendency of dispensing with the element of *mens rea* was said to have initially developed in the form of vicarious liability as the master would be held liable for the act of his servant despite his lack of *mens rea*.[21] This development was inspired by the fast-growing

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[17] Snyman *Criminal law* 242.

[18] Akpotaire 2007 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW (10 September 2010).

[19] *Sherras v De Rutzen* (1895) 1 918, at 921.QB.

[20] Milton and Fuller *Criminal law* 25. The origin of strict liability was briefly discussed in Chapter 1 of this study.

[21] Manchester 1977 *Anglo-Am.L.Rev.* 277. Where liability is imputed or attributed to another through vicarious liability or corporate liability, the effect of that imputation may be strict liability albeit that, in some cases, the accused will have *mens rea* imputed and so in theory will be as culpable as the actual wrongdoer. See in this regard Burchell *Criminal law* 555. The principle of vicarious liability is unknown in the criminal law, as this principle was borrowed from civil law. An employer is liable for a delict committed by his or her employee, if the delict was committed in the course and scope of the employee's employment. As far as common law crimes are concerned one can never be convicted for a crime committed by another to which one was not a party and in respect of which one had no culpability. Vicarious liability for statutory offences arises from the same set of policy considerations in the enforcement of public welfare legislation that underlies the principle of strict liability. *See* in this regard Burchell *Criminal law* 555. The policy underlying the creation of such vicarious liability is that it will encourage the employer to ensure that his employees' conduct complies with the provisions of the law, hence, he should not be allowed to hide behind his employees` mistakes, their mistakes are imputed to him, he has delegated his powers to them and more often than not gains financially from those activities. A typical example here is *Harrow London Borough Council v Shah Shah* [1999] 3 All

trend for businesses to be carried out by agents. The concept of strict liability was developed by the court in *R v Walter* in a mistaken understanding of the existing law towards the concept as understood.[22]

Strict liability offences were then accepted as being offences that were brought about by statute and were therefore unknown by the common law. There were only a few exceptions to the common law doctrine of *actus non facit reum nisi mensit rea.*[23] From these few exceptions, a vast proportion of what is known in England as police cases or regulatory offences, which are regarded as having no element of moral blameworthiness, but are necessary for the protection of the public welfare, have developed from the latter part of the 19th century through most of the 20th century.[24] Akpotaire, on the other hand, held the view that:-

> ... before the Middle Ages and the advent of classic Roman and Cannon law effects on the common law in England, offences were generally of strict liability. The then maximum of ancient law was *qui inscienter peccat scienter emendat* (he who commits evil unknowingly must pay knowingly); and *volens quot volens* (intending to or not intending to) the offender must be handed over to the next of kin of the deceased for vengeance. The concept of the deodant in old English law by which a criminal instrument was capable of punishment is some proof of the concept of strict liability in early English criminal law. The concept of strict liability evolved from being the rule in English criminal law to becoming an exception to the doctrine of *mens rea,* or of no liability without fault, owing to the combined influence of the Roman and Cannon Law principles on English legal scholars in the Middle Ages.[25]

2.3 COMMON LAW PERSPECTIVE

Before the introduction of strict liability offences in England, the common law doctrine of *actus non facit reum nisi mensit rea* was absolute. This is expressed as follows by Akpotaire:

ER 302. The accused were convicted for their employee's mistake, who sold a lottery ticket to a 13 year old in contravention of the law. The court convicted them despite the fact that they had warned employees to be careful not to contravene the Act. Accordingly, they were convicted because the employee committed an offence while acting within the scope of his employment. What is important here is the employer–employee relationship. The employer did not personally commit this offence either intentionally or negligently.

[22] *R v Walter* (1799) 3 Esp.21.

[23] The standard common law test of criminal liability is usually expressed in the Latin phrase *actus non facit reum nisi mens sit rea*, which means "the act does not make a person guilty unless the mind be also guilty".

[24] Akpotaire 2007 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf (10 September 2010).

[25] Akpotaire 2007 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf (10 September 2010).

> ... there can be no crime, large or small without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent without which it cannot exist. Every crime by this doctrine has a physical side which is volitional deliberate or willed in nature and not accidental and without the knowledge of the actor express or implied, while there is a mental element which connotes blameworthiness in the sense of the harm intended to be caused or actually caused where the actor is reckless as to whether or not the harm occurs, or indeed negligent as to the outcome.[26]

There have been divergent views about the existence of strict liability under common law. One group argues that strict liability offences are strictly statutory offences whereas the other argues that strict liability was indeed known to common law even though it was not as popular as after it had been introduced into legislation.[27] Allen reveals instances where he believes that strict liability was applicable under common law as follows:-

> It is a presumption of the common law that *mens rea* is required to be proved to establish guilt of a criminal offence. There is some doubt as to whether there are any exceptions to this principle at common law. Public nuisance and criminal libel have been cited as a common law crime of strict liability. A third common law offence which may involve strict liability is that of blasphemous libel ... . Strict liability applied to a fourth common law offence, criminal contempt of court involving the publication of material likely to prejudice a fair trial.[28]

The requirement of *mens rea* is widely recognised and, as it is longstanding, it is accepted as the basis for criminal requirement.[29] Having been firmly rooted in the early English common law, the doctrine of *mens rea* was inevitably introduced to South African criminal law. It is alleged that the origins of *mens rea* in its current form can be traced back to Roman law and some maintain that the concept existed even prior to the Roman and Canon law and suggest that it is reflected in the works of Plato and Aristotle.[30] The investigation of the history of *mens rea* was undertaken to give substance to the statement that *mens rea* has always been an integral part of criminal law.

2.4 COLONIAL REGIME

The regime of strict liability offences was transplanted into the South African criminal law system by English law.[31] British settlers first occupied the Cape

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[26] Akpotaire 2007 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf (10 September 2010).

[27] Allen *Criminal* law 81.

[28] Allen *Criminal* law 81.

[29] De Groff 2004 *50 Loy.L.Rev* 838.

[30] De Groff 2004 50 *Loy.L.Rev* 838.

[31] Burchell *Criminal law* 548.

Colony in 1795 when it formed part of the Dutch colonies. The reason for the occupation was to prevent France from taking control of the Dutch colonies.[32] The British approach to governing the Cape Colony was very relaxed and less interfering; however, in 1803 the Cape Colony was returned to the Dutch as a result of the peace agreement that was signed between France and England.[33] Britain found itself having to colonise the Cape again in 1806, however, and there was a significant change in the system of governance that was employed by the British in governing the Cape during its second occupation. According to an anonymous source:

> Remembering the problems that it had had in its American colonies, Britain decided to be more autocratic in its governance of the Cape. The Cape would be governed as a crown colony, with a governor appointed by England and inhabitants of the Cape would no longer have any say in political matters. The governor took his instructions only from the minister of Colonies in London and was given the power to make laws and dismiss officials as he saw fit.[34]

This marked an inevitable transplantation of the English law to South Africa. The year 1900 saw the victory of the British over the Dutch and they consequently gained control of the Orange Free State and two colonies, the Cape and Natal, which had been acquired earlier.[35] This victory placed the British in total control of what is known today as South Africa. This position facilitated the application of English law in South Africa. As indicated earlier, the British wanted to hold onto power and the colonies were run directly from London which simply meant that the laws that governed these colonies were English laws.[36]

Strict liability as practised in South Africa was a direct reproduction of the expression as practised in English law. It was during the colonial era that the application of strict liability was rife for obvious reasons, as the expression originated from English law and the British were ruling the country. This made it practically impossible for South African criminal law to escape the influence. *R v Fish* is another practical example of

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[32] Anon 2011 http://www.south-africa-tours-and-travel.om/colonial-history-of-south-africa.html (14 March 2011).
[33] Anon 2011 http://www.south-africa-tours-and-travel.om/colonial-history-of-south-africa.html (14 March 2011).
[34] Anon 2011 http://www.south-africa-tours-and-travel.om/colonial-history-of-south-africa.html (14 March 2011).
[35] Byrnes 1996 http://countrystudies.us/south-africa/16.htm (14 March 2011).
[36] In *Pharmaceutical Society of Great Britain v Storkwain* (1986) 2 AL, a pharmacist supplied drugs to a patient who presented a forged doctor's prescription but was convicted even though the House of Lords accepted that the pharmacist was blameless. The justification was that the misuse of drugs is a grave, social evil and pharmacist should be encouraged to take even unreasonable care to verify prescriptions before supplying drugs.

a case that was decided during the colonial era.[37] The appellant in this case was convicted of contravening section 6 of Act 5 of 1890, in that he sold one Marks, a police sergeant, a quantity of vinegar adulterated with water. The magistrate convicted the appellant, finding that it was unnecessary for the crown to prove intent to defraud. The court *a quo* found that, although the appellant had no intent to defraud, it nevertheless convicted him.

2.5 UNION OF SOUTH AFRICA

South Africa was granted self-governing status in 1910, but remained economically tied and loyal to the values of the British and even continued to carry out British global policies.[38] This state of affairs persisted until 1939, when the Boers decided to cut ties with their former coloniser.[39] However, the English influence remained. The extent of the English influence on South African criminal law is explicit in cases that were decided during the colonial era. The majority of cases that are referred to in this study were all empowered by legislation that confirmed the view that strict liability offences are mostly regulatory offences.

2.5.1 STRICT LIABILITY IN CIVIL MATTERS

Strict liability does not only apply on criminal matters. The principle is also applicable in civil matters. The yardstick is still the same as in criminal matters that, it is applicable in matters of public safety.

2.5.1.1 Product Related Cases

In a criminal case, strict liability means that a person can be convicted of an offence regardless of their culpability. The main question is whether there is such an approach under civil law; for instance, can a person be held civilly liable without considering the status of his mind when he caused the damage. As indicated earlier strict liability can be applied both in civil and criminal law; for example, in product liability cases involving injuries caused by manufactured goods, strict liability has had a major impact on litigation since the 1960s. In 1963, in *Greenman v Yuba Power Products*[40], the California Supreme Court became the first court to adopt strict tort

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[37] *R v Fish* 1904 21 S.C 183. *R v Langa* 1936 CPD 158, *R v Cronin* 1935 TPD 328, *R v Wallendorf* 1920 AD 383 & *R v Van Weilligh* 1931 CPD 247.

[38] Craigle 2011 http://wiki.answers.com/Q/How_did_the_coloniazation_of_South_Africa-end (16 March 2011).

[39] Craigle 2011 http://wiki.answers.com/Q/How_did_the_coloniazation_of_South_Africa-end (16 March 2011).

[40] *Greenman v Yuba Power Product* 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr .697 (1963).

liability for defective products. Injured plaintiffs have to prove the product caused the harm but do not have to prove exactly how the manufacturer was careless.[41]

Purchasers of the goods, as well as injured guests, bystanders and others with no direct relationship may sue for damages caused by the product. The above statement gives a clear indication that strict liability is not only limited to criminal offences, but it also extends to civil claims. The application of strict liability in both civil and criminal cases was meant to displace the element of fault. The application of this expression under civil litigation is not introduced by any legislation but strictly applied under common law rules. Under the civil law the person who suffered damage or was injured as a result of defective products only needs to prove that he sustained an injury as a result of the said product. It is absolutely irrelevant that the seller took reasonable steps to ensure that the product is properly prepared for sale.

Strict liability offences are not regarded as offences in the real sense. Although enforced as penal laws through the utilisation 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.[42]

An article on the case of *Rylands v Fletcher* also makes reference to strict liability under criminal law and tort law which is what we call civil law.[43] It says , in tort, it is a liability for a wrong that is imposed without the claimant having to prove that the defendant was at fault.[44] This is regarded as not being a defence in the torts that the dependants took reasonable care to prevent damage, but various other defences are admitted.[45]

2.5.1.2 The impact of the new Consumer Act 68 0f 2008

South Africa also introduced a legislation to protect the interest of the consumers. The idea was to ensure that those who suffered damage as a result of defective products are accordingly compensated.[46] The provisions of section 61 of the Act

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[41] *Greenman v Yuba Power Product* 59 Cal.2d 57, 377 P.2d 897, 27' Cal. Rptr .697 (1963).
[42] Standing Committee Report 7 64.
[43] Anon 2010 http://law.jrank.org/pages/17711/strict-liability.html (10 September 2010).
[44] Anon 2010 http://law.jrank.org/pages/17711/strict-liability.html (10 September 2010).
[45] Anon 2010 http://law.jrank.org/pages/17711/strict-liability.html (10 September 2010).
[46] Consumer Protection Act 68 of 2008
Purpose and policy of Act

3. (1) The purposes of this Act are to promote and advance the social and economic

dealt with the circumstances where there is a damage suffered as a result of a defective product that was sold to the consumer.[47] The language of the Act from

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welfare of consumers in South Africa by—
(a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
(b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—
(i) who are low-income persons or persons comprising low-income communities;
(ii) who live in remote, isolated or low-density population areas or communities;
(iii) who are minors, seniors or other similarly vulnerable consumers; or
(iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
(c) promoting fair business practices;
(d) protecting consumers from—
(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
(ii) deceptive, misleading, unfair or fraudulent conduct;
(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
(f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
(g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
(h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.
(2) To better ensure the realisation of the purposes of this Act, and the enjoyment of the consumer rights recognised or conferred by this Act, the Commission, in addition to its responsibilities set out elsewhere in this Act, is responsible to—
(a) take reasonable and practical measures to promote the purposes of this Act and to protect and advance the interests of all consumers, and in particular those consumers contemplated in subsection (1)*(b)*;
(b) monitor and report each year to the Minister on the following matters:
(i) The availability of goods and services to persons contemplated in subsection (1)*(b)*, including price and market conditions, conduct and trends affecting their consumer rights;
(ii) access to the supply of goods and services by small businesses and persons contemplated in subsection (1)*(b)*; and
(iii) any other matter relating to the supply of goods and services; and
(c) conduct research and propose policies to the Minister in relation to any matter affecting the supply of goods and services, including proposals for legislative, regulatory or policy initiatives that would improve the realisation and full enjoyment of their consumer rights by persons contemplated in subsection (1)*(b)*.

[47] Consumer Protection Act 68 or 2008

Liability for damage caused by goods

61. (1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—
(a) supplying any unsafe goods;
(b) a product failure, defect or hazard in any goods; or
(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,

section 1 until 3 of the Act was without a doubt similar to the one in *Greenman v Yuba Power Product* were the court adopted strict tort liability for defective products.[48] The Act was intending to protect vulnerable consumers from purchasing defective product without having recourse against the supplier for the damage or injury caused by consuming such product. Section 61 (3) interestingly even indicated that were there are more than one parties liable in terms for the Act they should be held severally and jointly liable. Strict liability in this instance only requires the complainant needs to only prove that the injury was caused by the product and the supplier will be held liable. The inclusion of 61 (4) (c) defeated the whole purpose that enactment of this legislation intended to achieve. The effect of section 61 4 is that it created defences for suppliers. Section 61 (4) (c) went further by affording the

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irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

(2) A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.

(3) If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.

(4) Liability of a particular person in terms of this section does not arise if—
(a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
(b) the alleged unsafe product characteristic, failure, defect or hazard—
(i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or
(ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;
(c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or
(d) the claim for damages is brought more than three years after the—
(i) death or injury of a person contemplated in subsection (5)*(a)*;
(ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)*(b)*; or
(iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)*(c)*; or
(iv) the latest date on which a person suffered any economic loss contemplated in subsection (5)*(d)*.

(5) Harm for which a person may be held liable in terms of this section includes—
(a) the death of, or injury to, any natural person;
(b) an illness of any natural person;
(c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
(d) any economic loss that results from harm contemplated in paragraph *(a)*, *(b)* or *(c)*.

(6) Nothing in this section limits the authority of a court to—
(a) assess whether any harm has been proven and adequately mitigated;
(b) determine the extent and monetary value of any damages, including economic loss; or
(c) apportion liability among persons who are found to be jointly and severally liable.

[48] *Greenman v Yuba Power Product* 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr .697 (1963)

supplier with an opportunity to escape liability in circumstances where it could have been liable as intended by the Act. Therefore, the section brought in the defect that the legislature did not foresee.

2.5.2 THE DISCUSSION OF BOGOSHI

Bogoshi[49] was the first South African decision that was critical to the approach adopted in *Pakendorf v De Flamingh and others*[50] regarding the application of strict liability. In *Pakendorf,* the then Appellate division held that the media would be held strictly liable for the wrongful publication of defamatory material. In other words, *Pakendorf* promoted strict liability in cases of civil litigation for defamation against the media. In the case of *Pakendorf v De Flamingh and others* the appeal was against the decision of Transvaal Provincial Division of awarding damages in favour of the plaintiff based on strict liability of press. The civil claim was brought against the owners, printers, publishers and editors of a newspaper for defamatory statement that was published in the newspaper about him about.

The statement reflected high level of unprofessionalism that was done by the Advocate towards unrepresented plaintiff, the behaviour which was highly criticised by the court. The newspaper erroneously quoted the respondent as the said Advocate who was criticized by the court. The court held that it would have been inequitable to the respondent to have allowed the owners of the newspapers concerned, under whose banner the defamatory statement was made to resort to lack of *animus injuriandi.* It therefore emphasised the need to maintain strict liability of press.[51] The court when deliberating on the judgment in *Pakendorf v de Flamingh* made to a foreign decision *of Wilson v Halle and others 1903 TH* 178. Rumpff JA held that in *Wilson v Halle and Others 1903 TH 178* in page *201* the court said:

> It has been decided in these Courts over and over again, and I believe also in the English Courts, that a company which makes business to publish newspapers, and which employs individuals to publish those papers, is responsible for any libel which may appear therein.[52]

Bogoshi criticised *Pakendorf,* which was decided long before the enactment of the Constitution, which promotes freedom of speech and access to information. It firstly looked at the decision that inspired the judgment in *Pakendorf.* It criticized the

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[49] *National Media v Bogoshi* 1998 (4) SA 1196 SCA.
[50] *Pakendorf v de Flamingh* 1982(3) SA 146(A).
[51] *Pakendorf v de Flamingh* 1982 SA 146 (A) p147.
[52] *Pakendorf v de Flamongh* 1982 (3) SA 146 (A) p156

decision by *Pakendorf* to bring a principle which was found to be controversial.[53] Hefer JA held that:

> In *Pakendorf* the Court recognised this form of liability in the law of defamation regardless of its fate in the country of its birth, and of the criticism which it had already attracted. In England Prof Holdsworth, as long as 1941, claimed that strict liability was productive of ndesirable litigation and that it encouraged purely speculative actions ('A Chapter of Accidents in the Law of Libel' (1941) LQR. In this country, Prof Price ((1960 *Acta Juridica* at 274) wrote: 'The suggestion that liability for defamation is absolute, or, for that matter merely strict, can depend only on such cases as *Hulton v Jones*, *Cassidy v Daily Mirror Newspaper*, *Newstead v London Express Newspapers Ltd* and *Hough v London Express Newspapers Ltd*. These decisions have no counterpart in our law, and their full implications have a given rise to much misgiving in England, leading to the considerable changes introduced by the Defamation Act of 1952. The unhappy doctrine of contributory negligence should have taught us a lesson in the matter of blindly following English legal trends, only to be left high and dry when reaction sets in. South African law owes a great deal to English law, but that is no reason for abandoning our own legal principles.[54]

The biggest challenge to the principle of strict liability as applied in *Pakendorf* was its nature of disregarding freedom of expression. This right was not recognised only after the introduction of the Interim Constitution and the final Constitution.[55] Hefer JA in *Bogoshi* acknowledged that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other.[56] It was therefore critical of *Bogoshi* for failure to weigh both interests and giving a due consideration to freedom of expression. [57] It must be taken into consideration that it was the appellant's ground for an appeal that the principle of strict liability should be rejected for its failure to take account of freedom of expression and expression.[58] The court in *Bogoshi* held that:

> ... if we recognize, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*. Much has been written about the "chilling" effect of the defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error... . In my judgement the decision in *Pakendorf* must be overruled. I am with respect, convinced that it was clearly wrong.[59]

The Heher JA in *Bogoshi* also held that the reasonable publication of a false defamatory statement can be raised as a defence. The court also indicated that the

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[53] *National Media v Bogoshi* 1998 (4) SA 1196 (SCA) 1206.
[54] *National Media v Bogoshi* 1998 (4) SA 1196 (SCA) 1206-1207.
[55] Interim Constitution 200 of 1993 & Constitution of the Republic of South Africa of 1996.
[56] *National Media v Bogoshi* 1998 (4) SA 1196 (SCA) 1207.
[57] *National Media v Bogoshi* 1998 (4) SA 1196 (SCA) 1207.
[58] *National Media v Bogoshi* 1998 (4) SA 1196 (SCA) 1206.
[59] *National Media v Bogoshi* 1998 (4) SA 1196 (SCA) 1210.

protection will only be provided for publication of material in which the public has an interest. *Bogoshi* acknowledges that it is crucial for the publisher to show that reasonable steps were taken to ensure the certainty and truthfulness of the information published.

2.6 APARTHEID REGIME

Racial segregation existed long before the apartheid regime. The British colonial government introduced pass laws in both the Cape and Natal colonies around 19th century to control the movement of blacks from their residential areas to the ones occupied by coloureds and whites.[60] However, apartheid was legalised after the 1948 elections as an instrument of oppression against people of other races. Strict liability offences continued to be in existence even after the inception of the apartheid regime and the courts continued to apply strict liability to regulatory offences until the 1950s, when there was a sudden decline in its application. Strict liability offences did not receive support from the beginning, although there was a sudden change of attitude by the courts in applying strict liability.

In *S v Qumbela,* the Appellate division in its 1966 decision by Holmes JA, held that-

> The basic principle is that *actus non facit reum nisi mens sit rea*. Current judicial thinking is recognising more fully the scope and operation of this fundamental rule of our law ... Of course the lawmaker has it within its power to override this fundamental principle of fairness; and to make absolute the duty of compliance with its behests, thus rendering innocent violations punishable. But such an inroad into individual freedom should be made to appear very plainly, so that he who runs may read.[61]

The Appellate division again demonstrated its lack of support for strict liability when it overturned the decision of the Natal provincial division in the case of *Amalgamated Beverage Industries v Durban City Council.*[62] It held that, in its view, strict liability needs to be imposed in order to effectively and satisfactorily enforce the by-law that prohibited the introduction or sale of contaminated food.[63]

The concept was less favoured during the apartheid regime despite the good it was attempting to achieve. In 1976, the Viljoen Commission of inquiry was

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[60] Anon 2011 http://en.wikipedia.org/wiki/South_Africa_under_apartheid (14 March 2011).
[61] *S v Qumbela* 1966 (4) SA 356 (A) at 364.
[62] *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1992 (3) SA 572 at 564F-G.
[63] *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1992 (3) SA 572 at 564F-G.

established to inquire into the penal system in South Africa.[64] The Commission used that opportunity to display its disapproval of the application of strict liability. This approach was in *ad idem* with the attitude that was displayed by the courts after the colonial era. The Commission held that:

> In spite of the recognition in certain legal systems of the so called strict liability offences, this commission remains impenitent and adamant in expressing the view that strict liability offences cannot be justified in the criminal law. If the "offender" unwittingly commits an act circumstances which totally absolve him from any blame, what is the object in punishing or even penalising him? There would, in the commission's view, be no sense in doing so.[65]

2.6.1 LEGISLATIVE FRAMEWORK

Despite the longstanding common law tradition of *mens rea,* a new approach to criminal offences emerged which totally displaced this element in some offences.[66] Strict liability was transplanted into South African criminal law through English law, where these offences were referred to as strict liability regulatory offences or public welfare offences. Public welfare offences are, in effect, no-fault, strict liability statutes enforced by the machinery of the state through its criminal law system.[67]

It is therefore logical to analyse some English decisions that applied strict liability in order to give a perspective on the background of the concept as it is applied in South Africa. Another issue that is of importance is the fact that all these decisions dealt with statutorily regulated offences. In *R v Pontes*[68] the accused was convicted for contravention of British Columbia Motor Vehicle Act of 594 (4) which automatically prohibited him from driving a vehicle for 12 months in terms of Section 92 of the same Act. The court indicated that the impugned provisions allow for the defences of reasonable mistake of fact and due diligence.

In the case of *Cundy v le Cocg*[69] it was regarded as a punishable offence to sell liquor to a person who was already drunk. The accused was therefore charged and convicted for selling alcohol to a person who was already drunk. In his defence he

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[64] Viljoen Commission *Penal System* (1976).
[65] Viljoen Commission *Penal System* (1976).
[66] In *Rex v Langa* 1936 CPD 158 page 160, the accused was charged and convicted of contravening section 61(1)(c) of Act 13 of 1928 for being in possession of dagga. The court borrowed from the principle that was set down in *R v Wallendorf* 1920 AD 383. Watermeyer AJP held that: "The conclusion that the court came to was that *mens rea* is as a rule necessary in a crime, but that the legislature may absolutely prohibit the doing of an act and constitute it an offence, without reference to the state of mind of the offender and regardless whether he had any intention of breaking the law or otherwise doing a wrongful act.
[67] De Groff 2004 50 *Loy.L.Rev* 840.
[68] *R v Pontes* [1995] 3 S.C.R. 44.
[69] *Cundy v Le Cocq* (1884) 13 QBD 207.

indicated that he and his staff had made a mistake in thinking that the person was sober when they had sold liquor to him. The court believed their version but held that the offence was committed when it was proved that the accused played a role in selling liquor to the person and the person served was drunk. Although the court classified this offence as being the one falling under strict liability the element of negligence on the part of the accused should be noted, which allows one to wonder why negligence was not made an element of this offence.

In *Sherras v De Rutzen*[70] the accused was convicted of selling liquor to a constable on duty, which was an offence at the time. In the case, the officer had removed an armband which was an indication that he was still on duty before he entered the accused`s premises. The court *quo* convicted him on the basis of the fact that the offence was one of strict liability. The divisional court, however, set aside the conviction and held that the offence was not one of strict liability. Strict liability, it is claimed, provides an improper basis for the imposition of criminal sanctions since it can lead to the punishment of the "faultless".[71] Such an outcome is said to be both unacceptable of itself and damaging to criminal law.[72]

Rex v Wallendorf is a South African decision which applied the strict liability concept in a statutory offence.[73] The accused were convicted for contravening section 8(5) of the Cape Act 27 of 1882 by resisting or hindering or disturbing a police officer in the execution of his duty. Juta JP held that:

> Looking at the scope of the Act, the nature of the offences, the careful way in which provision is made where the onus is on the part of the accused, I can come to no other conclusion than that if the crown proves all the essentials provided for by the statutes to constitute the offence, it has done all that is necessary. So that where it is proved that accused did resist, etc, a person, who was a policeman, and acting in the execution of his duty; it is not enacted in the section, viz, that the accused knew that the person was a policeman and one acting in the execution of his duty.[74]

Milton is of the view that there is no reason why the same consideration of equity and justice which ordain that *mens rea* should be an element of a common law crime

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[70] *Sherras v De Rutzen* [*1895*] 1 QB 918.
[71] De Groff 2004 50 *Loy.L.Rev* 840.
[72] Richardson 1987 CLR 295.
[73] *R v Wallendorf* 1920 AD 383.
[74] *R v Wallendorf* 1920 AD 383. Kotze J in page 389 of the same case of *R v Wallendorf* analysed this principle in a much more understandable manner when he held that: "The legislature has chosen to declare that, if a person resists a policeman in the execution of his duty, that shall be an offence, and for it he shall be liable for punishment: and the legislature has not gone further and said that the party resisting must be aware of the character of the policeman and of his duty."

should not also apply in the case of statutory crimes.[75] Despite two arguments that strict liability is unknown in common law, as it is a creature of statute which states that such offences are present under common law, this study supports the view that strict liability offences are creature of statutes in particular when you check the purpose of its creations. According to another source:-

> Most of the statutory offences of strict liability are regulatory offences which arise under the regulatory legislation controlling such matters as the role of food and other types of trading activity, health and safety at work, pollution and other public welfare matters which are usually investigated and prosecuted by a regulatory authority rather than police and the Crown Prosecution Service. Similarly, many of the offences in statutes regulating road traffic have also been held to be of Strict Liability, as have certain financial provisions. It must be emphasized; however that Strict Liability can arise even in respect of offences describe as "real" Crimes, i.e. crimes dealing with things which are inherently immoral (*mala in se*).[76]

The types of offence that fall into this category cover behaviour which could involve danger to the public, but which would not usually carry the same kind of stigma as a crime such as murder or even theft.[77] The difference between the true criminal offence and the public welfare offence is one of prime importance. Public welfare offences obviously lie in the field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety.[78] Potential victims of those who carry on latent activities have a strong claim to consideration. On the other hand, there is a general condemnation of the punishment of the morally innocent. These offences, as indicated earlier, are either called public welfare offences[79] or statutes which deal with issues of social concern.[80] Akpotaire holds that:-

> The re-emergence of strict responsibility offences or what has now become known as Public Welfare Offences in England probably became obvious from the decisions in *R v Woodrow*, and *R v Stephens*. In the former case Porkers held the Dependant liable for possession of adulterated tobacco where the word "knowingly" or similar words are absent from the statute. The main ground however, was that the crime was created for the protection of the Public Welfare. The court was of the view that the Defendant would

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[75] Burchell *Criminal Law* 2.

[76] Anon 2010 http://www.oup.com/uk/orc/bin/9780199578665/cardetal19e_ch06.pdf (10 September 2010).

[77] Anon 2010 http://vig.pearsoned.co.uk/catalog/uploads/Eliott_Criminal_CO2.pdf (12 September 2010).

[78] *R v Corporation of the City of Sault ste.marie* [1978] 2 SCR 1299.

[79] Burchell *Criminal law* 546.

[80] *Anon 2010* http://vig.pearsoned.co.uk/catalog/uploads/Eliott_Criminal_CO2.pdf (23 September 2010).

still be liable even where he was shown to be negligent that is, where he exercised all reasonable care and caution.[81]

It is not only in South Africa where strict liability offences are regulatory offences, as the Canadian criminal law also confirms this contention. The Attorney General of Canada, when commenting on strict liability, alluded to the fact that, generally, strict liability is commonly used in legislation concerning traffic and road safety, protecting revenue, consumer protection, workplace safety, occupational health, dangerous substances, waste disposal, and protecting the environment.[82] According to *Gammon v Attorney General of Hong* Kong,[83] where a statute is concerned with an issue of social concern (such as public safety), and the creation of strict liability will promote the purpose of the statute by encouraging potential offenders to take extra precautions against committing the prohibited act, the presumption in favour of *mens rea* can be rebutted.

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[81] Akpotaire 2007 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf (10 September 2010). Due diligence can only be raised as a defence where the statute, when creating an offence, provided the defence of due diligence. It very seldom happens that the statute provides for such a defence, hence more often than not people are convicted despite doing everything in their power to avoid committing the offence. One relevant example is the case of *Callow v Tillstone* (1900) 83 LT 411), where a butcher asked a veterinarian to examine a carcass to see if it was fit to be eaten. The veterinarian confirmed that it was okay to eat and the butcher then made it available for sale in his butchery. It transpired that the carcass was unfit for human consumption and he was therefore convicted for exposing unsound meat for sale. The reason for his conviction was that this was a strict liability offence and he was guilty irrespective of the steps he took to ensure that the meat was fit to be sold to people. It is virtually impossible to raise any defence against strict liability offences. In addition, it is argued that most traffic offences are strict liability offences. It sometimes happens that a person finds himself caught between suffering and breaking the law; it is human nature that a person will choose the latter. The defence of necessity is derived from the principles of common law and so it is available as a general defence to criminal liability, whether a common law crime or statutory provision is in issue. See in this regard Burchell *Criminal Law* 257. Strict liability offences have proven to be difficult to win. Although it is clear that necessity may be a successful defence in our law. The Appellate division laid down that exemptions from liability on this ground must be confined within the strictness and narrowest limits because of the danger attendant upon allowing a plea of necessity to excuse criminal acts. *See* in this regard Burchell *Criminal Law* 258. The discussion deals with necessity under normal offences that requires *mens rea*. It is clear that the court is still of the view that this defence should not enjoy the liberty that other defences enjoy but should be dealt with in a strict way. It will without doubt be even more difficult to succeed with this defence as far as strict liability offences are concerned. That does not necessarily mean we have to agree with the view that even where a person acted out of necessity and reasonably such defence should not be accepted by the court. A person who is exceeding the speed limit because he is rushing a sick person to the doctor should not be convicted irrespective of his reason for speeding. *See* in this regard *S v Pretorius* 1975 (2) SA 85 (SWA). Each case should be treated according to its merits. If it was necessary for a person to break the law in order to avoid harm, the court should be allowed to exercise its mind in deciding whether the explanation was reasonable or not.

[82] Standing Committee Report 7 2008 15.

[83] *Gammon (Hong Kong) Ltd and Others v Attorney General of Hong Kong* [1984] 2 All ER 503.

2.6.2 THE DERMINATION OF STRICT LIABILITY OFFENCES

There is no general requirement as to whether strict liability is applicable to an offence or not. Accordingly, it is up to the court to determine the intentions of the legislature by interpreting the specific legislation. The courts have been given the liberty to determine whether the legislature had intended the statutory crime as not requiring culpability despite the legislature's silence to that effect.[84] In such cases, the court considers factors like the nature of the offence, the statute concerned, the language of the legislation and the possible penalty that could be imposed if the conviction ensues.[85] As indicated earlier, strict liability offences are usually created by statute. The court is thus at liberty to interpret the statute as creating a strict liability offence even where the legislature is silent. Statutes do not state explicitly that a particular offence is one of strict liability.[86] J Wight held that:-

> With statutory strict liability the decision on whether or not the liability of the offence is strict depends on the wording of the Act. There are several key words and phrases that the courts look at in the statute to decide whether or not an offence is strict liability. These include: *ëpermitting* or *allowingí*, *ëcauseí*, *ëpossessioní*, *ëknowinglyí* and *ëwilfully* and *maliciouslyí*. The interpretation of these words will be what decides whether or not a *mens rea* or intention, recklessness or negligence is required.[87]

In order for the court to determine the requirement of strict liability, certain rules of interpretation need to be observed. Botha indicates that interpretation of statutes or the judicial understanding of legislation, deals with the body of rules and principles used to construct the correct meaning of the legislative provisions to be applied in a practical situation.[88] Botha acknowledges that the point of departure when interpreting a piece of legislation is the observation of the Constitution.[89]

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[84] Snyman Criminal law 244.

[85] Standing committee Report 7 2008 16. In *R v Van Weilligh* 1931 CPD 247 the accused was convicted of breaching section 64(a) of Act 30 of 1928 in that he sold liquor without having a licence as required by the Act. The court a quo held that the duly issued licence that the accused possessed was invalid because it was issued for premises that were at the rural area and the licensing board was forbidden by section54(1) of the Act from granting a licence under those circumstances. The appeal court per Watermeyer J held at page 249 to 250 that: "Selling liquor without a licence is an offence for which heavy fines can be imposed or, in the case of second offences, imprisonment in *lieu* of a fine. It was not therefore regarded by Parliament as a trivial offence, and it is also morally wrong because the offender is breaking the law for his own pecuniary benefit ... the General rule applies and that Parliament did not intend that a man should be deemed to be guilty of the offence of selling liquor without a licence if he in fact had a licence, the issue of which had been mistakenly authorised by the licensing court."

[86] Anon 2010 http://www.lawteacher.net/criminal-law/lecture-notes/strict-liability-lecture-1.php (10 September 2010).

[87] Wight 2010 http://www.peterjepson.com/law/A2-2%20Jonathan%Wight.htm (10 September 2010).

[88] Botha *Interpretation* 1.

[89] Botha *Interpretation* 54. Section 39 of the 1996 Constitution reads as follows:
(1) When interpreting the Bill of Rights, a court tribunal or forum

In some quarters, concern has been raised that the court is imbedded with such responsibility. The Attorney General's immense contribution to the scrutiny committee's report proved to be valuable. It commented on the issue of the liberty placed on the court to determine the existence of the application of strict liability and held that:-

> It is fair to say that this, to some extent, has created a black hole in relation to offences. It created a degree of uncertainty about when and where strict or absolute liability applied, and often this uncertainty could not be resolved until the matter was considered by a court, after the event, in terms of the conduct that formed the basis of the offence.[90]

This is the same sentiment that was shared by the court in *S v Qumbela* per Holmes JA.[91] The court reaffirmed the significant role that the element of *mens rea* plays to our criminal law system. It, however, acknowledged the powers that the legislature has to override this element and create strict liability offences. In the case of *Sweet v Parsley*,[92] the accused was a teacher who rented a house to students, although she did not live in the house. She was convicted for managing a house where dagga was being smoked despite the plea of lack of knowledge that the students were smoking dagga in the house.

The court a *quo* interpreted the offence as being strict liability and, subsequently, the Divisional Court also dismissed her appeal. The appellant took the matter further to

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(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom,
(b) must consider international law
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objective of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of rights. 1996 Constitution.

There are four theories of interpretation. The first one is the orthodox text-based (literal) approach. The interpreter is expected to interpret the legislation according to its literal meaning. Secondly, it is the purposive (text-in-context) approach. This form of theory concentrates on what the intention of the legislature was when enacting the legislation. The third one is the influence of the Supreme Constitution. This theory seeks to ensure that the provisions of section 2 and section 39 mentioned above are observed during the process of interpreting legislation. Lastly, it is a practical inclusive method of interpretation which also includes five techniques for interpretation. Snyman highlights some of the crucial issues that must be considered by the court when interpreting legislation. *See* Snyman *Criminal Law* 244. He mentions that the following must be considered:- The language and context of the provision;
(a) The scope and object of the provision;
(b) The nature and extent of the punishment;
(c) The case with which the provision may be evaded if culpability were required ; and
(d) The reasonableness of holding that culpability is not required.

[90] Standing committee Report 7 2008 17.
[91] *S v Qumbela* 1966 (4) SA 356 (A).
[92] *Sweet v Parsley* [1970] AC 132.

the House of Lords and Lord Reid indicated that it was hard to believe that the Court of Appeal had felt bound to reach such an obviously unjust result. The court in *Sweet v Parsley* acknowledged the fact that in most cases the statute is silent on whether it creates strict liability offences. Lord Reid held further that:-

> In such cases there has for centuries been a presumption that parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that wherever a section is silent as to *mens rea* there is a presumption that in order to give effect to the will of parliament, we must read in words appropriate to require *mens rea*.[93]

S v Qumbela held that the legislature must not be shy to indicate in clear and uncertain terms the offences that are expected to be strict liability.[94] This suggestion is an attempt to take away from the courts powers that could lead to disparities in the judgments of judicial officers despite the similarity of facts. Burchell highlighted the fact that the theory of strict liability has never succeeded in winning a large number of supporters through the years,[95] the reasons being that not only is the universal nature of fault a feature of criminal liability in all civilized legal systems, but also because the normal principles for interpreting the statutes would ordinarily be opposed so as to require fault as an element of statutory offences. He further concluded that:-

> As a general rule, penal statute must be strictly construed. Since strict construction strives to favour the liberty of the subject, the concept, in this context, requires that in the face of ambiguity, penal statutes should be constructed so as to require fault as an element of statutory offence. This approach is sustained by the presumption that the legislature intent to alter the existing law as little as possible. The effect of this presumption is likewise to postulate that where the statute is ambiguity, fault ought to be on the element of a statutory offence. [96]

The court in *S v Qumbela* was against the statute that leaves it up to the court to determine the intentions of the legislature and held that such intentions must be explicit in the legislation. Lord Goddard in *Brend v Wood* held that:-

> ... it is in my opinion 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, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.[97]

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[93] *Sweet v Parsley* [1970] AC 132 para 2.
[94] *S v Qumbela* 1966 (4) SA 356 (A).
[95] Burchell *Criminal law* 546.
[96] Burchell *Criminal Law* 546.
[97] *Brend v Wood* (1946) 62 TLR.462.

Another case that clearly indicated that strict liability offences are regulatory offences is *Harrow LBC v Shah and Shah*: the defendants were the owners of a newsagent where they also sold lottery tickets.[98] In terms of Section 13(1)(c) of the National Lottery Act 1993, it is deemed an offence to sell a lottery ticket to children under the age of 16. The accused were well aware of this condition and had warned their staff not to sell lottery tickets to anyone under the age of 16; moreover, they had told their staff that they should ask for an identity document if they had any doubts about the person's age.

Subsequently, a member of staff sold a lottery ticket to a 13-year-old boy without demanding proof of age, believing that the boy was over 16. The Divisional Court held that the offence was one of strict liability and did not require *mens rea*. The fact that they had sold a ticket to a person under the age of 16 was sufficient to justify their conviction despite their extraordinary efforts to prevent this from occurring. In both these cases the court turned a blind eye to a due diligence shown by the accused in attempting to avoid committing the offence.

2.7 CONCLUSION

The purpose of this chapter was to investigate the origin and purpose of strict liability. Investigation revealed that the existence of strict liability offences came about as a result of the English influence. This concept was not without controversy because of its effect of dispensing with the element of *mens rea* to secure a conviction. It was said to have been created for the benefit of the public. Burchell states in this regard that:-

> The rise of a modern urbanised and industrial society has created a crucial need for the establishment and maintenance of certain standards of safety and hygiene in commercial, industrial and social undertakings. Because of the crucial nature of these standards it was reasoned that persons violating them should be subject to a form of strict liability which takes no account of fault.[99]

Strict liability offences were originally created in order to help punish business-related offences. Such offences were inspired by the fact that it would be practically impossible to establish the *mens rea* of directors if a company is being prosecuted. In addition, public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interest. The strict liability

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[98] *Harrow London Borough Council v Shah and Shah* [1999] 3 All ER 302.
[99] Burchell *Criminal law* 546.

concept flourished during the colonial era for obvious reasons stemming from the fact that it was introduced into our legal system by the British colonialists. The change of government in 1910 affected the application of some of the principles that were brought by the English.

The beginning of the apartheid regime saw a decline in the application of strict liability. The opposition against these offences at the time was against the immense power that was placed on the courts in determining the intentions of the legislature as to whether it intended an offence to be strict liability or not. The court, as per Holmes JA in *S v Qumbela,* held that it is imperative that the legislature should indicate clearly its intentions if it intended an offence to be strict liability.[100] Those who opposed strict liability approached this from a different direction even to the Viljoen Commission, which indicated that it failed to comprehend how the law could sanction the punishment of a faultless person.[101] The disapproval of the application of strict liability did not succeed in bringing about the permanent abolishment of strict liability. However, this study revealed the purpose of the creation of strict liability as being to deal with the offences that threaten the safety of the public. It also revealed how this concept was transplanted into our legal system.

[100] *S v Qumbela* 1966 (4) SA 356 (A).
[101] The Viljoen Commission *Penal System* (1976).

CHAPTER 3: STRICT LIABILITY AND FOREIGN LAW

3.1 INTRODUCTION

The argument of this study is to the effect that the application of strict liability offences contravenes the rights of the accused entrenched in the Constitution because of its effect of creating reverse onus.[102] Such rights are the right to remain silent, to be presumed innocent and privilege against self-incrimination.[103] It is evident that no law can be developed or interpreted without referring to constitutional guidance and obligations. It is the same Constitution that provides us with the liberty to borrow principles from international law when developing or interpreting any rights entrenched in the Bill of Rights or any law. The relevant provision of the Constitution reads as follows:-

> (1) When interpreting the Bill of Rights, a court, tribunal or forum
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.[104]

The Constitution being the supreme law of the country provides a green light to our courts to consider international and foreign law when interpreting and/or developing the law. The consideration of this aspect of the law will be done mostly through decided cases from various countries. However, this does not necessarily mean literature will be totally disregarded. The idea is to find the legal system that could be of guidance to the South African legal system in terms of how to apply this principle of strict liability keeping its harshness to the accused as minimal as possible. The possibility of having it completely removed from our legal system will also be investigated. The unjust part of this principle has become the main concern by those who oppose its existence.

Various cases decided in different countries, including Canada, England, Hong Kong, Botswana, Nigeria, Australia and Singapore among others, will be explored with the specific goal of determining best practices. The common factor about all these legal systems is the fact that they all require the prosecution to only prove *actus reus* in order to secure a conviction in strict liability offences. Some systems

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[102] 1996 Constitution.
[103] S 35 3(h) 1996 Constitution.
[104] S39 1996 Constitution.

believe that the intention of the legislature to create strict liability offences must be clearly reflected in the statute,[105] whereas others, on the other hand, provide the court with the liberty to interpret the statute as requiring strict liability.[106]

The understanding of strict liability is that the successful proving of *actus reus* is sufficient to secure a conviction. The implication of this is that the mindset of the person is irrelevant for as long as it can be proved that he willingly committed the prohibited act. However, some legal systems are of the view that a defence of due diligence should be considered by the court.[107] The same sentiment of allowing some form of defence is shared by others, who on the other hand believe in a more formal way of suggesting that the empowering legislation must specifically create those defences that can be raised against strict liability offences.

3.2 APPLICATION OF STRICT LIABILITY BY SOUTH AFRICAN COURTS

This study will start as a point of departure, by discussing the principle of strict liability as applied in South Africa. The purpose for such a move is to ensure that there is no uncertainty as to the manner in which the principle is applied in South Africa when looking into other legal systems. It is imperative to bear in mind the fact that South African principle was influenced tremendously by English law. It is because of this influence that there is a striking similarity between the applications of this principle by both legal systems. The effect of English law on South African principle of strict liability is that the courts are at liberty to interpret the provision as not requiring culpability even where the legislature in creating a statutory crime is silent on the requirement of culpability. [108] The principle of strict liability as applied in South African law relieves the prosecution of its duty to prove the fundamental elements of fault by therefore depriving the accused of an opportunity to raise a defence excluding fault.[109]

Hunt states that:-

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[105] Phipps UDLR 201.
[106] Zungu-Ndwandwe JJASA 35.
[107] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *R. v. Pontes* [1995] 3 S.C.R. 44; R. v. *Wholesale Travel Group Inc.* [1991]. 154.
[108] Snyman *Criminal Law* 242.
[109] Burchell and Hunt *Criminal Law* 294.

> Fault relates to the person's free and informed decision to do that which he or she knows (or foresees) to be unlawful or inadvertent failure to behave as a reasonable person would in the same circumstances.[110]

South African law supports the notion that fault is an important element of every crime, including statutory crimes.[111] Milton shares the same sentiment as law and states that there is no reason why the same consideration of equity and justice which ordains that *mens rea* should be an element of a common law crime should not also apply in the case of statutory crimes.[112] The spreading of this notion was also perpetuated by Burchell and Hunt, who indicated that it is a firmly established principle of criminal justice that there can be no liability without fault, which requires that the accused, in addition to *actus reus,* must have *mens rea* in order to be held criminally liable for any criminal conduct.[113] Burchell & Milton commented that:-

> ... understandably, the theory of strict liability has not won a large number of supporters over the years. This is not only because of the universal and fundamental nature of fault as a feature of criminal liability in all civilized legal systems but also because the normal principles of interpretation of statutes would ordinarily operate so as to require fault as an element of statutory offences.[114]

These renowned writers were, however, at pains to mention that there are exceptions to this firmly established principle of criminal law. They were also very quick to highlight the fact that these exceptions, namely, *versari in re illicita* and strict liability, do not enjoy any real following in modern South African law.[115]

In as much as strict liability was regarded as part of our law, even the courts are reluctant to interpret any statute as requiring strict liability. Since the 1970s, there has been a significant decline in the number of cases that the courts interpreted as requiring strict liability. This valuable information is provided by Snyman, who is of the view that such a decrease can be attributed to the criticism against the principle of strict liability.[116] The popular view about strict liability offences is that they are not by nature a true criminal offence; as a result they attract a light penalty and they are

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[110] Burchell and Hunt *Criminal Law* 221.
[111] Burchell *Criminal law* 2.
[112] Burchell *Criminal law* 2.
[113] Burchell and Hunt *Criminal Law* 220.
[114] Burchell and Hunt *Criminal Law* 290.
[115] Burchell and Hunt *Criminal Law* 288. This doctrine of *versari in re illicit* which is recognised by both Enlish and Roman-Dutch law simply means that a person can be held liable for the unintended consequences of an illegal activity.
[116] Snyman *Criminal Law* 242.

further regarded as public welfare offences.[117] The court, in *Amalgamated Beverage Industries,* held that in its view, strict liability needs to be imposed in order to effectively and satisfactorily enforce the by-law that prohibited the introduction or sale of contaminated food.[118]

The aggrieved party took the matter on appeal; however, the appellate division set the conviction aside. The court further held that fault in the form of negligence was required in order to secure a conviction of contravening the said by-law.[119] Strict liability was supported in this matter by the dissenting judgment of Botha JA. Botha JA held that:-

> In my judgement the factor which is of decisive weight is the subject-matter of the by-law in question. In essence it prohibits food traders from dealing in contaminated food. It does so with the object of safeguarding the health of the public, which is obviously a matter of great importance to the lawgiver. (Its importance is perhaps not as well illustrated by the picture of the bee in the bottle or by the idea of typhoid germs in a batch of meat pies). It is accordingly inherently probable that the law-maker intended its prohibition to be as effectively enforceable as possible. Most statutory prohibitions are conceived in the public interest, to be sure ..., but not all of them clamour for strict enforcement with the same degree of urgency. A prohibition against any person selling bread at a price less than a prescribed minimum price does not stand on the same footing as a prohibition against persons who do business as bakeries from making and distributing bread which contains noxious substances... Two features in my view, to the intention to impose strict liability. Firstly, contraventions of the prohibition endanger and may have disastrous effects on public health, which it is the concern of the lawmaker to protect. Secondly, the prohibition is directed only at that specific class of persons who are engaged in the business of dealing in food.[120]

The dissenting judgment reflected the basis upon which the courts in the past decided that legislation required strict liability to be imposed. This judgment without a doubt revealed in a clear manner that the offence was indeed for the protection of the public and the offence could not attract a term of imprisonment. The court, despite the clear indication that the offence qualified to be interpreted as requiring strict liability, elected to succumb to the pressure of the criticisms and held that at least fault in the form of negligence was required. This judgment illustrated just how reluctant the courts are to apply the principle of strict liability. The attitude of the

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[117] Anon 2010 http://vig.pearsoned.co.uk/catalog/uploads/Elliott_Criminal_C02.pdf (10 September 2010).

[118] *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1992 (3) SA 572 at 564F-G.

[119] *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994 (1) SACR 373 (A) 385.

[120] *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994 (1) SACR 373 (A) 382-3.

courts as early as 1966 displayed support for what was regarded as being the basic principles of criminal law. In *S v Qumbela* Holmes JA held that:-

> The basic principle is that *actus non facit reum nisi mens sit rea*. Current judicial thinking is recognising more fully the scope and operation of this fundamental rule of our law ... Of course the lawmaker has it within its power to override this fundamental principle of fairness; and to make absolute the duty of compliance with its behests, thus rendering innocent violations punishable. But such an inroad into individual freedom should be made to appear very plainly, so that he who runs may read.[121]

The court reiterated the importance of recognising the basic requirements of fault as being an integral part of our criminal law. It, however, acknowledged the powers that the legislature has to override as it puts it "a fundamental principle of fairness"[122] and, indeed, by so saying acknowledged the injustice attached to strict liability offences.

3.2.1 THE ATTITUDE OF THE COURTS AFTER 1994

The period after 1994 is the constitutional era. Accordingly, Snyman states that:-

> After the coming into operation of the present Constitution it is uncertain whether the principle according to which a court is free to interpret a statutory provision creating a crime in such a way that no culpability is required for liability is compatible with the Constitution.[123]

Snyman alludes to the fact that the issue of strict liability has not been dealt with thoroughly by the Constitutional Court. This is so despite the hostile attitude illustrated by the courts towards the principle of strict liability since its inception and, around the 1970s, which was long before the introduction of the supreme Constitution. Quite correctly, as Zungu-Ndwandwe indicates, our courts are still at liberty to apply strict liability and convict a blameless person at any given time until such time as the Constitutional Court pronounces on the constitutionality of strict liability.[124] Frankly, the Constitution has not brought any meaningful contribution to how strict liability should be applied under the current dispensation. It is the popular view of South Africans that should this principle be challenged it is highly unlikely that it would pass the constitutional muster.[125]

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[121] *S v Qumbela* 1966 (4) SA 356 (A) at 364.
[122] *S v Qumbela* 1966 (4) SA 356 (A) at 364.
[123] Snyman *Criminal law* 243.
[124] Zungu-Ndwandwe JJASA 35.
[125] Snyman *Criminal law* 243.

The courts are still showing hostility towards strict liability but nothing is being done to remove it from our system. The Constitutional Court in *S v Coetzee* had an opportunity to put an end to uncertainties surrounding this principle, but it elected to show disapproval and left it untouched.[126] O'Regan J in *S v Coetzee* held that:-

> At common law, fault requirement is generally met by proof of intent (dolus) in one of its recognised forms, and, in rare circumstances, by the objective requirement of negligence (culpa) ... As Kentridge AJ has mentioned in para [94] of his judgment, the requirement of fault or culpability is an important part of criminal liability in our law. This requirement is not an incidental aspect of our law relating to crime and punishment; it lies at its heart. The state's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment. This principle has been acknowledged by our courts on countless occasions.[127]

The Constitutional Court did nothing but promote the observance of the fault element in considering a criminal conduct. It said in no uncertain terms that the punishment would be justified by the blameworthy state of the accused's mind. O'Regan J, to support her disapproval of strict liability offences, made reference to the Viljoen Commission in its report on the penal system of the Republic of South Africa in 1976.

The commission in paragraph 5.1.2.82 held that:-

> In spite of the recognition in certain legal systems of the so called strict liability offences, this commission remains impediment and adamant in expressing the view that strict liability offences cannot be justified in the criminal law. If the "offender" unwittingly commits an act which is prohibited by the criminal law under circumstances which totally absolve him from any blame, what is the object in punishing or even penalising him? There would in the commission's view be no sense in doing so.[128]

This is but an indication of how much the principle of strict liability was opposed in South Africa. It was, however, up to the Parliament then to decide whether to remove this principle from our law or not. The Parliament was unfortunately not persuaded by the number of people against the principle and the reluctance of the courts to apply to act towards removing it. The report by Viljoen was not enough to convince the Parliament otherwise. Before 1994, the court's duty was to apply the law enacted by the Parliament, while the period after 1994 signalled a new era where the court had the powers to declare any law or conduct that is inconsistent with the Constitution invalid. The court in *S v Coetzee* paid lip service to strict liability as if it

[126] *S v Coetzee* 1997 (3) SA 527 (CC).
[127] *S v Coetzee* 1997 (3) SA 527 (CC) para 162.
[128] *S v Coetzee* 1997 (3) SA 527 (CC) para 164.

were oblivious of its powers to also act towards providing lower courts with the much-awaited certainty of the law surrounding this controversial aspect of the law.

3.3 APPLICATION OF STRICT LIABILITY IN BOTSWANA

The difference between Botswana and South African criminal law is that the Botswana law is codified.[129] It applied the same system that was applied by the Southern African countries like South Africa and Lesotho until in 1964, when its penal code came into operation.[130] However, the criminal courts referred to English law decisions extensively as the code is based on English law principles. It is this same English influence that introduced strict liability in South Africa. The application of criminal law in Botswana seems to be similar to South Africa owing to the English influence. The same goes for the approach to *mens rea*. Frimpong states that:-

> It is a general principle of law that *mens rea* is assumed to be a requirement of any criminal offence. This principle applies to the offences created in the Penal Code, just as it does to other statutory offences created by the legislature.[131]

It is always surprising to note how a legal system can support a principle of no liability without fault and the doctrine of strict liability at the same time. The same approach is followed by Botswana criminal law. The following statement reflects the view expressed above about the legal system that is in support and against strict liability at the same time:-

> In a limited number of cases, an accused may be convicted of an offence even if there is no *mens rea* on his part. There are offences of strict liability which form a distinct and controversial category within the criminal law. [132]

Strict liability offences are not only regarded as controversial in South Africa but also in Botswana. In the case of *S v Mosinyi*[133] the accused was convicted of contravening the provisions of the Fauna Conservation Proclamation 1961. The court held that the offence was one of strict liability as the requirement of *mens rea* would defeat the purpose of the enactment. Botswana criminal justice also regards public welfare offences as better qualifying for strict liability offences. For instance, in the above matter of *Mosinyi* nature and the benefits it brings are regarded as a

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[129] Frimpong *Criminal Law* 4.
[130] Frimpong *Criminal Law* 4.
[131] Frimpong *Criminal Law* 22.
[132] Frimpong *Criminal Law* 22.
[133] *S v Mosinyi* 1972 2 BLR 31HC.

national treasure that should be preserved for the benefit of the public either directly or indirectly.[134]

3.4 STRICT LIABILITY IN NIGERIA

Nigerian criminal law, like its Botswana counterpart, is codified. Be that as it may, strict liability is still understood in the same context as it is understood in all other countries in as far as an element of fault or *mens rea* is concerned. It is still regarded as the offence that dispenses with the proving of an element of *mens rea*. Unlike Botswana, Nigerian criminal law is not influenced by English law, as Nigeria has strived to rid its system of any English influence by creating a comprehensive legal system that caters for all necessary offences. Akpotaire, in support of this statement, states that:-

> Upon a strict legal construction of the codes in force in Nigeria i.e. the Criminal Code and Penal Code, criminal law in Nigeria has no business with the English doctrine of *mens rea* as developed at common law considering that the codes have extensive provisions dealing with the mental element of a crime. This view has been expressed with some force as follows. First and most important, there is really no need to import *mens rea* into Nigerian Criminal law at all in view of the provisions in the criminal code itself.[135]

It is an acknowledged fact that the general principle of criminal responsibility in Nigeria is similar to the common law doctrine of *actus non facit reum nisi mensit rea*.[136] The application of strict liability in various countries seems to be very confusing as it mostly allows the court the freedom to determine through interpretation that crime is a strict liability. However, such confusion was not experienced with regard to common law offences as it was an accepted norm mostly that common law offences require *mens rea* to be proved at all times. The concern about Nigerian criminal law is that it does not have a common law as part of it, which leaves the court with too much freedom to introduce strict liability even under unreasonable circumstances. This view was also confirmed by Akpotaire when he states:-

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[134] *S v Mosinyi* 1972 2 BLR 31HC at 34.

[135] Akpotaire 2010 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf (10 September 2010).

[136] Akpotaire 2010 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf (10 September 2010).

> Several offences exist in Nigeria both within and outside the codes which by common law standards should have a guilty mind, but are treated purely as strict responsibility offences not by any known or discernible pattern of principle but rather by an ad hoc abstraction from case to case.[137]

This contention by Akpotaire reveals a very sorry state of affairs. The statement basically implies that the court, in deciding whether to interpret an offence as requiring strict liability, is not guided by any legal principle. The court is at liberty to declare any offence as being strict liability under sometimes highly questionable circumstances. Despite the lack of English common law influence, Nigerian criminal law still regards fault as an important element of an offence. The code also confirms this state of affairs in terms of section 48 of the Penal code, which reads as follows:-

> Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution.[138]

The exception to the provision of this section is strict liability. Akpotaire admits that for as long as strict liability exists in Nigeria, it should borrow from principles of other jurisdictions in an effort to minimise its harsh effect in Nigeria, thereby further clearing up uncertainties surrounding its application.[139] As indicated earlier, Nigerian law still holds the view that in strict liability offences. It is enough for the prosecution to prove the *actus reus*.[140]

3.5 STRICT LIABILITY IN ENGLISH LAW

Strict liability originated from English common law. The application of this principle by the English is strikingly similar to the way the principle is applied in South Africa for the obvious reason that South African law was hugely influenced by English common law. Burchell and Hunt express their view as to the origin of strict liability as follows:-

> Strict liability in statutory crimes originated in the Anglo-American criminal law during the middle of the nineteenth century. In South Africa the concept of strict liability made an early appearance. Under the influence of English statutes, the doctrine flourished.[141]

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[137] Akpotaire 2010 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf (10 September 2010).

[138] Nigerian Penal Code Law.

[139] Akpotaire 2010 http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/STRICT%20LIABILITY%20AND%20THE%20NIGERIAN%20CRIMINAL%20CODES,%20A%20REVIEW.pdf (10 September 2010).

[140] Okonkwo and Naish *Criminal Law* 60.

[141] Burchell et al *Criminal Law and Procedure* 292.

The English writers reveal the extent to which they respect an element of *mens rea*. Smith states that:-

> The idea that *mens rea* is in some sense a basic or indispensable ingredient of criminal liability is deeply rooted. For example, Stroud held that: the guilt of an act charged against a prisoner must always depend upon two conditions...[which]...may be called the condition of illegality (*actus reus*) and the condition of culpable intentionality (*mens rea*). Kenny's view was that: no external conduct, however serious or even fatal its consequences may have been, is ever punished unless it is produced by some form of *mens rea*. These writers explicitly discount the phenomenon of strict liability, and they should not be taken to task for failing to elucidate matters with which they were not concerned.[142]

3.5.1 THE APPROACH BY THE ENGLISH COURTS

The English courts strongly support the interpretation of statutes as requiring strict liability where there is a belief that the offence is necessary for the protection of the public and is a regulatory offence. This view is supported by an anonymous source which states that:-

> ... the court must examine the overall purpose of the statute. If the intention is to introduce quasi criminal offences, strict liability will be acceptable to give quick penalties to encourage future compliance, e.g fixed-penalty parking offences. But, if the policy issues involved are sufficiently significant and the punishment more severe, the test must be whether reading in a mens rea requirement will defeat Parliament's intention in creating the particular offence i.e. if defendants might escape liability too easily by pleading ignorance, thus would not address the "mischief" that Parliament was attempting to remedy.[143]

The abovementioned aspect is the criterion that is being used to establish whether the offence is strict liability. The following section contains a discussion of leading English cases on the subject to also determine whether the courts observed the criteria outlined above in deciding these cases.

3.5.2 THE APPROACH OF STRICT LIABILITY BY COURT IN B v DPP

The accused in *B v DPP*[144] matter was a 15-year-old boy who was convicted of inciting a child under the age of 14 to commit an act of gross indecency in contravention of section 1 of the Indecency with Children Act 1960. The magistrate ruled that B's belief that the girl was over 14 years was irrelevant, or the crime required strict liability. The House of Lords set the conviction aside and indicated that

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[142] Smith *Reshaping the Criminal Law* 103.
[143] Anon 2010 http://wapedia.mobi/en/Strict_liability_(criminal) (10 September 2010).
[144] *B v DPP* [2000] 1All ER at 848.

the Act did not displace the common law presumption of *mens rea*[145]. It is important for the court to consider the intention of the legislature when interpreting whether it intended the legislation to create strict liability. Having the seriousness of this offence in mind it becomes difficult to accept that the intention was to have the principle of strict liability applied. Lord Nicholls of Birkenhead held that:-

> As habitually happens with statutory offences, when enacting this offence Parliament defined the prohibited conduct solely in terms of the proscribed physical acts. Section 1(1) says nothing about the mental element. In particular, the section says nothing about what shall be the position if the person who commits or incites the act of gross indecency honestly but mistakenly believed that the child was fourteen or over. In these circumstances the starting point for a court is the established common law presumption that a mental element, traditionally labelled *mens rea*, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. The common law presumes that, unless Parliament indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence. On this I need do no more than refer to Lord Reid's magisterial statement in the leading case of *Sweet v. Parsley* [1970] A.C. 132, 148-149:'. . . there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*. . . . it is firmly established by a host of authorities that *mens rea* is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.'[146]

The consequences of convicting the accused in this matter were severe. The accused's name was going to be entered in a register of sexual offenders and the sentence was not merely a fine, but a term of imprisonment of 18 months. There is no doubt about the stigma attached to a conviction on a sexual offence charge. Sexual offences cannot be classified as public welfare offences, like offences such as speeding on a public road or selling contaminated food. All these issues negate the fact that the legislature wanted to create a strict liability, hence the conviction was set aside. Lord Steyn held in B that:-

> It is not enough to label the statute as one dealing with a great social evil and from that to infer that strict liability was intended.[147]

B's case was a typical example of cases were strict liability could be used to the disadvantage of the innocent or blameless. It is not every convicted person manages to refer the matter for an appeal due to numerous circumstances, ranging from lack of knowledge of the law or funds to instruct a counsel to prosecute the appeal. Those

[145] *B v DPP* [2000] 1All ER at 848.
[146] *B v DPP* [2000] 1All ER at 833.
[147] *B v DPP* [2000] 1All ER at 848.

obstacles can see a blameless person getting stuck with an unfair conviction. This case also revealed how risky and unfair it is to give the court the liberty to interpret the legislation to exclude or include strict liability.

3.5.3 THE APPLICATION OF STRICT LIABILITY PRINCIPLE IN R v BLAKE

The decision in *R v Blake*[148] is one where the court ignored the signs that the offence was not strict liability and convicted the accused.

> Investigation officers heard an unlicensed radio station broadcast and traced it to a flat where the defendant was discovered alone standing in front of the record decks, still playing music and wearing a set of headphones. Though the defendant admitted that he knew he was using the equipment, he claimed that he believed he was making demonstration tapes and did not know he was transmitting. The defendant was convicted of using wireless telegraphy equipment without a licence, contrary to s1(1) Wireless Telegraphy Act 1949 and appealed on the basis that the offence required mens rea. The Court of Appeal held that the offence was an absolute (actually a strict) liability offence. The Court applied Lord Scarman's principles in *Gammon* and found that, though the presumption in favour of *mens rea* was strong because the offence carried a sentence of imprisonment and was, therefore, "truly criminal", yet the offence dealt with issues of serious social concern in the interests of public safety (namely, frequent unlicensed broadcasts on frequencies used by emergency services) and the imposition of strict liability encouraged greater vigilance in setting up careful checks to avoid committing the offence.[149]

Gammon[150] set down some useful guidance on how to deal with strict liability offences. *Blake* manipulated its facts to suit the requirements set down by *Gammon* despite the fact that even the basic criteria that was used to determine strict liability offences before *Gammon* were directing the court towards acknowledging the need to declare the offence as requiring the element of *mens rea*. It would be advisable at this stage to see how the court dealt with the *Gammon* guideline. In *Blake,* Lord Justice Hirst guided by the principle laid down by Lord Scarman in *Gammon* held that:-

> In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their lordships greater fully acknowledge): (1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the

[148] *R v Blake* [1997] 1 All ER 963.

[149] Anon 2012 http://www.lawteacher.net/criminal-law/cases/strict-liability-cases.php (08 May 2012)

[150] *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1984] 2 All ER 503.

> statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue, (5) even where a statute is concerned with an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.[151]

There was a strong opposition by the counsel for the appellant that the offence that the appellant was convicted of was a strict liability. The argument was based on the fact that the offence was truly criminal to start with and the accused could face a term of imprisonment upon conviction. The submission by the appellant's counsel that the seriousness of the offence requires that the legislation should be interpreted as requiring *mens rea* to form an element of an offence was acknowledged. However, it failed to bring the expected results. The confirmation is found from the comment where Lord Hirst said:-

> The solution to this case, which we have not found easy, clearly lies in the application of the five principles laid down by Lord Scarman in the Gammon case. In our judgment, since throughout the history of the subsection an offender has been potentially subject to a term of imprisonment, the offence is "truly criminal" in character, and it follows that Mr Levy is correct in submitting that the presumption in favour of *mens rea* is particularly strong. However, it seems to us manifest that the purpose behind making unlicensed transmission a serious criminal offence must have been one of social concern in the interests of public safety for the reasons given by Mr Davies, since undoubtedly the emergency service and our traffic controllers were using radio communications in 1949, albeit in a much more rudimentary form nowadays. No doubt the much greater sophistication of these modes of communication, and the wider prevalence of pirate radio stations 40 years on, led to the substantial increase in the penalty in 1990. Clearly interference with transmission by these vital public services poses a grave risk to wide section of the public. We therefore consider that the test laid down in paragraph (4) in Gammon is met. Furthermore, we are satisfied that the test in paragraph (5) is also met, since the imposition of an absolute offence must surely encourage greater vigilance on the part of those establishing or using a station, or installing or using apparatus, to avoid committing the offence, e.g. in the case of users by carefully checking whether they are on air; it must also operate as a deterrent.[152]

The counsel for the appellant argued the case in accordance with the guidelines that were in place at that particular moment. The argument in favour of strict liability was to the effect that strict liability offences are not true criminal offences. They were also said to have been offences that attract a small penalty, probably a fine. The court in this matter went off at a tangent by disregarding all the guidelines that were set down long before its decision. It ignored the harshness and unjust nature of strict liability offences and the severe sentence that can be imposed on conviction. It even

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[151] *R v Blake* [1997] 1 All ER 963 at 970-971.
[152] *R v Blake* [1997] 1 All ER 963 at 973-974.

disregarded the fact that the offence was found to be a true criminal offence and sadly accepted that all the facts strongly suggest that the presumption of *mens rea* must be proved. The court based its decision on the fact that the offence was regarded as one of social concern and public safety.

It is the submission of this study that the court misdirected itself by classifying this offence as strict liability and furthermore this approach will increase confusion in an already confusing principle. *B v DPP*[153] offered a necessary relief when it held that the issue of public protection or social concern cannot be the only deciding factor as to whether strict liability is applicable or not. *B*'s case did not remove all the uncertainties surrounding strict liability, but offered a necessary remedy to the damage that *Blake* was causing to an already controversial principle.

3.5.4 THE ANALYSIS OF THE STRICT LIABILITY PRINCIPLE IN PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v STORKWAIN

A pharmacist in *Pharmaceutical Society of Great Britain v Storkwain*[154] was convicted for supplying a patient who submitted a forged prescription with drugs. The House of Lords accepted that the pharmacist was blameless but nevertheless convicted him, as the court held that the offence was a strict liability.[155] The court justified such decision by saying the misuse of drugs is a grave social evil and that pharmacists should be encouraged to go beyond taking reasonable care to verify prescriptions before supplying drugs.

The injustice promoted by the principle could be clearly observed from this case. The court ignored the repercussions that could follow the conviction of the blameless pharmacist: he could lose his licence to operate his business. The courts have a tendency to put the interests of the public before the principle of fairness promoted by the introduction of *mens rea* to an offence. The issue of elevating public protection and social concern over other issues was, accordingly, displaced *B v DPP* when it held that such issue should not be the only consideration.

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[153] *B v DPP* [2000] 1 All ER 833.
[154] *Pharmaceutical Society of Great Britain v Storkwain* [1986] 1 WLR 903 [HL]
[155] *Pharmaceutical Society of Great Britain v Storkwain* [1986] 1 WLR 903 [HL] at 910.

3.5.5 A DIFFERENT ANGLE TO THE PRINCIPLE OF STRICT LIABILITY AS PER SWEET v PARSLEY

The decision of *Sweet v Parsley*[156] has been very influential in the field of strict liability. The appellant was convicted for managing a property where the smoking of cannabis was taking place. The court *a quo* classified the offence as strict liability and convicted her despite the fact that she was not living on the premises and she could not have possibly known about this incident. The conviction was quashed by the House of Lords on the grounds that the offence was not a strict liability. Lord Reid held that:-

> ... there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*.[157]

The nurturing of this principle by the court would have been the best recipe for the extinction of strict liability, because most of these offences are regulatory offences and require the court to interpret them in order to establish the intention of the legislature. Parliament rarely reflects on whether the offence that the statute created displaces the element of fault or not, thus leaving it to the court to establish that. Parsley emphasised two important aspects that *Blake* trivialised and that is the stigma attached to the true criminal offences. In *Parsley* Lord Reid was uncompromising when coming to these two aspects of "stigma" and "true criminal offence". He held that:-

> ... when one comes to acts of a truly criminal character, it appears that to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma. So he would have to consider whether, in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape. And equally important is the fact that fortunately the press in this country are vigilant to expose injustice and 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 of its administration.[158]

The court never displayed the element of disapproval of strict liability offences. It analysed the principle applicable to strict liability in an impartial way and it never lost

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[156] *Sweet v Parsley* [1969] UKHL 1 (23 January 1969).
[157] *Sweet v Parsley* [1969] UKHL 1 at para 2.
[158] *Sweet v Parsley* [1969] UKHL 1 at para 2.

sight of the importance of *mens rea* in the criminal justice system. It promoted the notion that, if it is the intention of the legislature to rule out *mens rea,* it must do so either clearly or by necessary implication. It further held that failure by the statute to do so should limit the freedom of the court to convicting a person unless he has a guilty mind. English courts have enough jurisprudence on strict liability because the principle originates from English common law.

3.6 SINGAPORE CRIMINAL LAW AND STRICT LIABILITY

Singapore criminal law is also codified and is largely influenced by the Indian Penal Code',s interpretation of *mens rea* , as per section 39 of the code that reads as follows:-

> 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.[159]

Singapore applied the criminal law of the United Kingdom around the 19th century, which was an indication that English common law was recognised in that territory.[160] It also applied the Indian Acts until the enactment of Singapore Penal Code in 1871.The Singapore legal system recognises the importance of observing the mental status of a person during the commission of the offence. The introduction of Singapore Penal Code saw the demise of the general doctrine of *mens rea* as developed by English common law[161]. The doctrine of strict liability continued to be applied despite the new system that was in place. Cheong commented that:-

> Offences of strict liability are, despite [their] proliferation in number, commonly regarded as an exception to the general rule that proof of *mens rea* is a prerequisite to criminal liability. Its acceptance in Singapore is twice anomalous given the structure of the Penal Code ("the Code"), which does not provide for the continued reception of common law principles including those on strict liability, and that many of the defences found in Chapter IV of the Code... provide that there can be no criminal liability without proof of some form of guilty mind. ... The state of the law in Singapore is further

[159] Act 45 of 1860 Indian Penal Code.
[160] Singapore Penal Code http://www.facebook.com/pages/Singapore-Penal-Code/138911362794787 (08 May 2012).
[161] Singapore Penal Code.

> complicated by the fact that, just as in England, no clear or consistent principles can be deciphered for imposing strict liability.[162]

The effect of this doctrine in Singapore is similar to South Africa, Botswana, Nigeria and Canada. The leading case in Singapore is *Lim Chin Aik v R*.[163] It is a well-known fact that more often than not, strict liability offences expose blameless people to punishment. The punishment that follows that kind of conviction is unlikely to have the necessary deterrent effect on the accused. The court held in *Lim Chin* that:-

> Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of class of persons whose conduct could not in any way affect the observance of the law, their lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended.[164]

Lim Chin Aik,[165] like *Sweet v Parsley*[166] and *B v DPP,*[167] supports the notion that the mere fact that the statute is labelled as one dealing with a grave social evil is not reason enough to conclude that strict liability was intended. The board held further that:-

> It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.[168]

Lim Chin Aik had been convicted under Singapore Immigration Ordinance[169] which made it an offence for someone prohibited from entering Singapore to enter or remain there. The appellant was prohibited but he was not aware of it, as such order of prohibition was not communicated to him nor published in anyway. The Privy Council advised that his conviction should be set aside due to the fact that it would be futile. The court's approach to strict liability was interestingly different from the way the above discussed countries approach it. The application of this principle in Singapore even though acknowledging that the offence concerns an issue of social

[162] Cheong *Requirement of fault in strict liability SALJ* 98.
[163] *Lim Chin Aik v R* [1963] AC 160 (PC).
[164] *Lim Chin Aik v R* [1963] AC 160 (PC) 174-175.
[165] *Lim Chin Aik v R* [1963] AC 160 (PC).
[166] *Sweet v Parsley* [1969] UKHL 1 (23 January 1969).
[167] *B v DPP* [2000] 1 All ER 833.
[168] *Lim Chin Aik v R* [1963] AC 160 (PC).174-175.
[169] Singapore Immigration Ordinance 5 of 1952 S(9).

concern or public safety focuses much on what the punishment flowing from the strict liability offence conviction will achieve.

The goal of the Singapore system is to ensure that the punishment has a certain positive impact on the public; it should be in a position to deter the accused and others. Singapore does not consider the severity of the sentence or the stigma attached to the conviction or at least does not place much emphasis on them apart from deterrence. The punishment imposed must persuade the accused to lead his life differently and where possible influence other people to observe the law. It allows the accused to argue that conviction on strict liability is not going to serve any purpose, which might be a ground for acquittal. The interesting part about these offences is that sometimes they call for the conviction of a person who might have taken reasonable steps to avoid contravening the law. It is instances like these that this study believes that the approach by the Singapore system will absolve the accused from conviction.

A typical example is the case of *Callow v Tillstone* where a butcher was convicted of offering unsound meat for sale.[170] A conviction followed despite the reasonable steps he took to ensure that the meat was safe for human consumption by sending the carcass to a veterinarian to check. Subsequently, the vet gave the butcher the go ahead to sell it. The court accepted his explanation but nevertheless convicted him because the offence was strict liability. However, it is believed that the butcher's sentence served no purpose because he was convicted despite the fact that he had sent the meat to an expert. There is nothing more he could have done to avoid the contravention. The Singapore system, however, offers a solution by saying such person should not be convicted and sentenced.

3.7 THE CONTRIBUTION BY HONG KONG LAW ON STRICT LIABILITY

In Hong Kong the *Gammon* case is the most influential decision with regard to the aspect of strict liability principle. English common law played a major role in influencing and shaping the criminal justice system of Hong Kong and this influence can be easily identified in *Gammon*. Lord Scarman quoted with approval in this regard the view by Lord Reid on *mens rea* in *Sweet v Parsley*. Lord Reid held that:-

[170] *Callow v Tillstone* (1900) 83 LT 411).

> It is firmly established by a host of authorities that *mens rea* is an essential ingredient of every offence unless some reason can be found for holding that it is not necessary.[171]

Lord Scarman laid down some guidelines on how to approach strict liability as follows:-

> In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their lordships grater fully acknowledge): (1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue, (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.[172]

The guideline produced by the court in *Gammon* served as guidance and had a tremendous influence not only on English law, but also on many other legal systems; including South Africa. In Hong Kong like in all other countries the principle of strict liability was not a stranger to controversy. There is an argument which supports the use of the principle of strict liability and the one that opposes it. According to those who support the principle it encourages greater observance of and compliance with the law in matter involving public safety, health welfare.[173] Secondly, by relieving the prosecution of the duty to prove *mens rea* it improves the efficiency of administrative and judicial systems.[174]

3.7.1 THE IMPACT OF THE HONG KONG BILL OF RIGHTS TO STRICT LIABILITY

The enactment of the Hong Kong Bill of Rights Ordinance has had a crucial role to the recent development of strict liability principle in Hong Kong.[175] Jackson commented that:-

> Firstly, the Bill of Rights has been used to mount general challenges to the whole notion of strict liability in the criminal law. Secondly, it has been relied on to challenge specific statutory provisions placing on the defendant the burden of proving certain matters leading to an acquittal of presuming

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[171] *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1984] 2 All ER 503 at 504.
[172] *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1984] 2 All ER 503 at 508.
[173] Jackson *Criminal law in Hong Kong* p196.
[174] Jackson *Criminal law in Hong Kong* p196.
[175] Hong Kong Bill of Rights Ordinance

> certain matters to exist unless the contrary is proved by the defendant, some of which arise in relation to strict liability offences. Finally, it has been relied on to, justify the recognition of a 'halfway house'defence of 'reasonable mistake'and possibly further defence of 'due diligence (or reasonable steps).[176]

The principle of strict liability is said to have been inconsistent with the provision of Article 5 (1) of the Hong Kong Bill of Rights Ordinance.[177] The introduction of the Hong Kong Bill of Rights Ordinance played a major role in assisting to challenge other aspects of law which had the effect of infringing on the rights protected by the Bill of Rights. However, it failed to provide enough ammunition to challenge strict liability.

The provisions of Article 5 (1) did not furnish sufficient content to address the injustice that is brought by application of strict liability. The article 5 (1) objects to having a person subjected to arbitrary arrest or detention or deprived of.... liberty except on such grounds and in accordance with such procedures are established by law.[178] A closer scrutiny of this section discloses a lack of objection by this section to the practice of strict liability. The only requirement by the section is that the arrest and detention of a person should be in accordance with the procedures established by law. The principle of strict liability was established by law, it therefore becomes difficult to challenge it utilising the provisions of Article 5 (1).

Jackson commented that:-

> So far, this challenge has been rejected in Hong Kong. In *R v Hui Lan-Chak [1992] DCt,* Case no 556 of 1992, 8 September 1992, for example, concerning offences against sections 37 C (1) (a) and (2) (b) of the Immigration Ordinance (cap 115), Judge Lugar-Mawson in the District court held that the Bill of Rights does not per se prohibit the creation of strict liability in Honk Kong, nor does the notion of strict liability itself infringe Article 5 (1). He also held that sections 37 C (2) (b), which expressly enacts a due diligence to be proved by the defendant, does not infringe the presumption of innocence in Article 11 (1) of the Bill of Rights, although he reached this conclusion in part on the basis that the burden placed on the defendant was to be treated as only an evidential burden.[179]

The unfortunate shortcomings on the Article were but unforeseen by the legislature. The consequences of the last portion of Article 5 (1) of the Bill of Rights which indicates that deprivation of liberty or detention can only be justified if it's done in accordance with procedures established by law could not be comprehended. It is

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[176] Jackson *Criminal law in Hong Kong* p197.
[177] Hong Kong Bill of Rights Ordinance
[178] Hong Kong Bill of Rights Ordinance Article 5 (1)
[179] Jackson *Criminal law in Hong Kong* p197.

with great regret to indicate that Article 5 (1) was devoid of necessary ingredients to successfully challenge the principle of strict liability. The challenge on the validity of strict liability principle utilising the provisions of Article 5 (1) was not only employed in the case mentioned by Jackson above. The same challenge was taken further to the Court of appeal in *R v Wang Shih-hung, R v Fong Chin-Yue* and also rejected by the court.[180]

Bokhary JA held that:-

> ...an offence is not automatically open to challenge under the Bill of Rights merely because it is an offence of strict liability. Of course, that is not to say that the express wholesale abolition of each and every mental element in our criminal law would be consistent with the Bill of Rights. If effective, such measure would leave no one with liberty or security of person. And of course the right to liberty and security of the person is a right secured for everyone under Article 5(1) of the Bill of Rights. But where the conclusion that a statutory offence is an offence of strict liability is a conclusion arrived at by a process of construction, then there would be no room left for an argument that the statutory provision creating that offence is inconsistent with the Bill of Rights.... That is because of the high human rights contents of the rules of construction which the courts apply to determine what a penal provision really means. Those rules were summarised by Lord Scarman in ...Gammon[181]

The challenge against strict liability with reference to Article 5 (1) will never be successful with the provisions of the Article in its current form. The Hong Kong law though does recognise the harshness of strict liability to the innocent and the Courts are endeavouring to minimise the effect thereof.[182]

3.8 THE PRINCIPLE OF STRICT LIABILITY IN AUSTRALIA

The attitude of the criminal justice system in Australia is that fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter and should only be done if there are sound and compelling public interest justifications for doing so.[183] This statement, made by the New South Wales legislation Review Committee, is an indication that the Australian legal system shares the view with other countries that strict liability should only be imposed if the statute is intended to deal with the matter of social concern or public safety. In *Proudman v Dayman,* a decision by the High Court of Australia,[184] even though

[180] *R v Wang Shih-hung, R v Fong Chin-Yue* [1995] 1 HKCLR 193.
[181] *R v Wang Shih-hung, R v Fong Chin-Yue* [1995] 1 HKCLR 193 at 200.
[182] Jackson *Criminal law in Hong Kong* p199.
[183] Submission of the New South Wales Council for Civil Liberties to the New South Wales Legislation Review Committee Inquiry into Strict and Absolute Liability, August 2006.
[184] *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536.

empowering legislation did not expressly create defences, the court indicated that, defence of mistake on reasonable grounds could still be accepted. Dixon J differed with the decision of the Supreme Court where he held that:-

> Their honours were all of the opinion that the applicant had not made out in fact any defence of mistake on reasonable grounds and that under S.30 it was not incumbent upon the prosecution to establish that the applicant knew that a licence for the time being in force was not held by the person whom she permitted to drive the motor vehicle.[185]

The Supreme Court held that the section 30 mistake will not afford a defence. Dixon J on the other hand held that:-

> The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on these grounds ground he did not so believe.[186]

Dixon J supported the view of the defence of mistake. This approach is slightly different from the South African application of the principle, which at the moment does not have a provision for defence for strict liability.

3.8.1 CRIMINAL CODE ACT

Australian criminal law is not based on English common law anymore but codified. Criminal Code Act[187] governs criminal justice process in Australia. Chapter 2 adequately provides for principles of criminal responsibility. The Act recognises only those offences that are created by the Act.[188] The Code also recognised the need to incorporate the principle of strict liability in the criminal law to cater for situations that requires its application.[189] In terms of Division 6 of the Code:-

> Division 6—Cases where fault elements are not required
>
> 6.1 Strict liability
> (1) If a law that creates an offence provides that the offence is an offence of strict liability:
> (a) there are no fault elements for any of the physical elements of the offence; and
> (b) the defence of mistake of fact under section 9.2 is available.
> (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
> (a) there are no fault elements for that physical element; and

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[185] *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at 537.
[186] *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at 538.
[187] Criminal Code Act 12 of 1995.
[188] Criminal Code Act 12 of 1995 S 1.1.
[189] Criminal Code Division 6.

(b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
(3) The existence of strict liability does not make any other defence unavailable.

The criminal code had a major influence to how the Civil Aviation Amendment Regulation was drafted.

3.8.2 STRICT LIABILITY UNDER CIVIL AVIATION AMENDMENT REGULATION

The Civil Aviation Amendment Regulation introduced a number of strict liability offences.[190] McKeown held that:-

> CASA in the Civil Aviation Amendment Regulations 2003 has in no uncertain terms introduced the notion of making most offences, offences of strict liability. It first started to do so as it drafted the new Regulations (now known as Parts), I have heard, on the basis that the Criminal Code Act 1995 (the Code) said it had to make all new offences, offences of strict liability. This is not what the Code said. In lay terms the Code merely said that when drafting new laws after 15 December 2001 that involved creating an offence, it is a requirement to state what the fault element to the offence should be.[191]

According to Mckeown it was a misinterpretation to believe that the Code expected all new offences that are created to be strict liability. The following provision from the Civil Aviation provides confirmation to the above statement by Mckeown.:-

> **1. Ensuring strict liability offences remain strict liability offences**
>
> The Regulations provide that each of the offences (or particular elements of offences) listed in Table 1 below will be offences (or elements) of strict liability.
> An offence of strict liability is an offence where no fault elements apply to the physical elements of the offence. A fault element can only be dispensed with in relation to an offence (or in relation to a particular element of an offence) if the offence provision specifies that it is a strict liability offence (or that a particular element is a strict liability element). The defence of mistake of fact is available for a strict liability offence (or a strict liability element of an offence). In the absence of express reference that an offence (or element of an offence) is strict liability, a court will be obliged by the *Criminal Code Act 1995* to interpret the offence (or element of the offence) as a fault offence (or fault element) rather than a strict liability offence (or fault element), and will require proof of fault elements in relation to the physical elements of the offence (or element of the offence).[192]

The table mentioned in the quoted paragraph above outlines a number of offences which are said to be strict liability. However, the list confirms the contention that the

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[190] Civil Aviation Amendment Regulation 5 of 2003
[191] McKeown 2012 http://mckeown.com.au/strict-liability.htm (09 May 2012)
[192] Civil Aviation Amendment Regulations 2003 Regulation 3.

Civil Aviation Amendment Regulation of 2003 brought along a number of strict liability offences. Strict liability principle is available in Australian criminal and it is accordingly codified in the Criminal Code Act and applied by Civil Aviation Amendment Regulation 0f 2003.

3.9 THE PRINCIPLE OF STRICT LIABLITY IN CANADA

Canada is another legal system that has a rich jurisprudence on strict liability and three of the most crucial cases in this field were decided in Canada. These cases are *R v Sault Ste. Marie*[193], *R v Pontes*[194] *and R v Wholesale Travel Group inc*[195] and these cases will be explored with the idea of better understanding the application of this principle in Canada and in the hope of discovering a principle that will minimise the harshness of this principle in South Africa. Canada is one of the few legal systems that have raised concerns about strict liability and taken the initiative to deliberate on it. After such deliberations, concerns were raised about strict liability by the Standing Committee on Legal Affairs performing the duties of scrutiny of bills and subordinate legislation committee [hereinafter referred to as Scrutiny Committee]. The committee held that:-

> The Scrutiny Committee's major concern has been the seemingly increasing prevalence of strict and absolute liability offences appearing in legislation and the potential impact that such offences might have on an accused person. One of the Scrutiny Committee's frequently expressed concerns is that such offences have the potential to erode certain human rights, particularly the presumption of innocence and the right to a fair trial. In the parlance of the Scrutiny Committee's terms of reference, strict and absolute liability offences have the potential to:
> - unduly trespass on personal rights and liberties;
> - make rights, liberties and/or/ obligations unduly dependent upon insufficiently defined administrative powers.[196]

The principle is still applied in Canada as a matter of social concern or public safety. It removes the fault element of an offence, which simply means there is no need for the prosecution to prove fault for as long as it successfully proved *actus reus*. There is a significant similarity between the way the principle is applied in Canada and in Australia. This is confirmed by the reference with approval by Dickson J in *R v Sault Ste. Marie* to the quote by Justice Galligan in *R v Hickey,* when he made reference

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[193] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299
[194] *R. v. Pontes* [1995] 3 S.C.R. 44
[195] R. v. *Wholesale Travel Group Inc.* [1991]. 154.
[196] Standing committee Report 7 2008 1.

to the way strict liability offences are handled in Australia. Mr Justice Galligan held that:-

> Submissions were made to this court about the difficulties involved in prosecution of speeding cases and other strict liability offences if this defence is a valid one in law. In my opinion, the availability of the defence as a matter of law should make no unreasonable burden upon the prosecution or the courts. It is clear from the Australian authorities that not only is the burden of proving such a defence upon the accused, he must prove it upon a balance of probabilities.[197]

3.9.1 MENS REA IN CANADA

The approach of *mens rea* in Canada was also influenced by English common law. All the legal systems that were discussed, acknowledged the crucial role that is played by the element of *mens rea* in a criminal justice system. It is the fairness attached to this element that persuades people to offer such resistance to the application of the strict liability principle. It is the same fairness that makes the courts take great care in applying strict liability principle in practice. In *R v Sault Ste.Marie* Dickson J held that:-

> The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be liable for the wrongfulness of his act if that act is without *mens rea* ... Blackstone made the point over two hundred years ago in words still opt: ... to constitute a will, and secondly: on unlawful act consequent upon such vicious will ... would emphasise at the outset that nothing in basic principles which follows is intended to dilute or erode that.[198]

3.9.2 DEFENCE OF DUE DILIGENCE

Canada, like its Australian counterpart, accepts defence of due diligence or reasonable care in strict liability offences. In *R v Sault Ste. Marie* the court held that:-

> While the prosecution must prove beyond reasonable that the defendant committed the prohibited act, the defendant need only establish on the balance of probabilities his defence of reasonable care.[199]

The court further classified three categories of offences: the first being the offences which require that *mens rea* must be established; the second being offences of "strict liability" in which *mens rea* need not be established but where the defence of reasonable belief in a mistaken set of facts, or the defence of reasonable care is

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[197] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1319.
[198] *R. v. Sault Ste. Marie,* [1978] 2 S.C.R. 1299 at 1303.
[199] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 1300.

available; and third being offences of "absolute liability", where it is not open to the accused to exculpate himself by showing that he was free of fault. The interesting part of this classification is that the court when dealing with strict liability is cautious not to forget to mention available defences for strict liability.

Just as it is indicated that the defence of due diligence is accepted as a normal practice in Canada, Cory J held in *Wholesale travel* held that:-

> Strict liability offences, as exemplified in this case by the combination of S.36 (1)(a) and S.37.3(2)(a) and (b) of the Competition Act, do not infringe either S.7 or 5.11(d) of the charter. Neither the absence of a *mens rea* requirement nor the imposition of an onus on the accused to establish due diligence on a balance of probabilities offends the charter rights of those accused of regulatory offences.[200]

The purpose of this paragraph is to show the acceptance by the Canadian courts of the fact that the accused in a strict liability offence can raise a defence. The emphasis of the accused's right to have a valid defence in a strict liability was expressed even in the case of *R v Pontes.*[201] The court in *Pontes* as per Major J reiterated that the defence of due diligence must be available to defend a strict liability offence. The court was, however, at pains to indicate that in that specific matter:-

> ... as a result of the wording of the section, the only possible defence an accused could put forward is his ignorance of the fact that his licence had been suspended by the provisions of the provincial statute, which constitute a mistake of law and therefore is not available as a defence, an accused is denied the defence of due diligence.[202]

3.9.3 PUBLIC WELFARE OFFENCES

The doctrine of strict liability in Canada came about as a result of the English common law influence for obvious reasons that Canada is part of British Commonwealth countries. Therefore, it is of no surprise that Canadian courts, like English courts regard strict liability offences as quasi criminal offences and public welfare offences. In *Wholesale Travel* Cory J held that:-

> The common law has acknowledged a distinction between truly criminal conduct and conduct, otherwise lawful, which is prohibited in the public interest. Regulatory offences and crimes embody different concepts of fault. The *mens rea* requirement is not required in regulatory offences. Since regulatory offences are directed primarily not to conduct itself but to the

[200] *R. v. Wholesale Travel Group Inc.* [1991]. 154 217.
[201] *R. v. Pontes* [1995] 3 S.C.R. 44.
[202] *R. v. Pontes* [1995] 3 S.C.R. 44 at 45.

> consequences of conduct, conviction of a regulatory offence imports a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offence suggests nothing more than failure to meet a prescribed standard of care.[203]

Dickson J also contributed to the discussion about public welfare offences; he even went to the extent of highlighting its origin. He held that:-

> Public welfare offences evolved in mid nineteenth century Britain...as a means of doing away with the requirement of *mens rea* for petty offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the every-increasing complexities of modern society.[204]

3.9.4 RECOMMENDATIONS BY THE CANADA STANDING COMMITTEE ON LEGAL AFFAIRS

The Scrutiny committee, after a careful consideration of all the submissions and deliberations, set down some principles and recommendations that could be followed to reform the principle. The attitude of the committee was that strict liability offences should continue to exist. It is with regret that this study will indicate that the committee did not bring any significant change to the doctrine of strict liability. This can be read from the language that was used by the committee when setting down its recommendations. The committee used the words "the Criminal code should continue to" regularly as an indication that it preferred the status *quo* to stand.[205] The other recommendations are not worth discussing, as they have no bearing on the purpose of this study or the development of the doctrine of strict liability.

3.10 CONCLUSION

The purpose of this chapter was to explore how legal systems from various countries approach the principle of strict liability. This task was undertaken with a view to discover a more favourable principle that could be used to reform our South African system. Accordingly, this study looked at the legal systems of Botswana, Nigeria, England, Singapore, Hong Kong, Australia, and Canada among others. It is an accepted fact by all these legal systems that *mens rea* is an integral part of their criminal justice system. This view is confirmed by O'Regan J in *S v Coetzee* when she held that:-

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[203] *R. v. Wholesale Travel Group Inc.* [1991] 154 at 194.
[204] *R. v. Sault Ste. Marie,* [1978] 2 S.C.R. 1299 at 1310.
[205] Standing committee Report 7 2008 115.

> The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the state. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the state may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule. Where culpability is established, and the conduct is legitimately deemed unlawful, then no such breach arises.[206]

Botswana criminal law, although codified, was also influenced by English common law. The contents and formulation of their sections were informed by English common law which was in application in Botswana before the introduction of their criminal code. In this context, Botswana criminal law is analysed for the purpose of illustrating that their principle is as much influenced by the English common law as ours. However, Botswana did not do much to develop their principle; as a result, we cannot borrow from them for the development of our strict liability principle. Nigerian criminal law is also codified and is thus immune from the English common law influence.

The Nigerian criminal code covers all aspects of criminal law, which makes it unnecessary for the courts to refer to any system, including the English system, in defining the contents of their offences. However, its approach to strict liability is the worst of them all. The Nigerian courts have wide powers and they treat some of the offences, even those that are regarded as common law, as requiring *mens rea* as strict liability offences. This system does not provide guidance, but increases the controversy surrounding the principle of strict liability.

In contrast is the view of Zungu-Ndwandwe, when she states that:-

> In my view, the Canadian and English courts' dealing with the controversy surrounding strict liability is commendable. The right to a fair trial and a principle of no liability without fault is balanced against the interest of the accused and the community. This may inform the South African legal system as to how best it can deal with the controversy surrounding the principle of strict liability.[207]

The application of strict liability by English courts is, as a matter of fact, exactly the same as in South Africa. This study holds this view because the contents of this principle as applied in South Africa are informed by the English common law. The same goes for Canada apart from a slight difference which makes a significant

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[206] *S v Coetzee* 1997 (3) SA 527 (CC) para 176.
[207] Zungu-Ndwandwe JJASA 35.

contribution which this study will refer to later. The English courts treat strict liability offences as being in place for the protection of the public, which is the sentiment shared by its South African counterparts. It would be misleading to hold that South African courts can learn from English courts.

However, this study was intrigued by the approach applied by the Singapore legal system to strict liability. This approach gives large-scale support to the views of this study in chapter 4. Singapore criminal law is also codified. However, their strict liability principle is similar to the principle of those systems influenced by the English common law, in as far as it dispenses with the element of fault. The courts in Singapore strongly support the view that the sentence imposed for a strict liability offence must serve a certain purpose. They hold further that imposition of futile sentences should not be promoted. This is one principle that could play a positive role in developing the principle.

A ground-breaking decision came from Hong Kong in the form of *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong*, which influenced the practice by English courts and other legal systems. The court in *Gammon* laid down some guidelines that must be considered by the courts when dealing with strict liability. This study was intrigued by the fifth principle laid down by Gammon. The principle reads as follows:-

> (5) Even where a statute is concerned with an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.[208]

The inclusion of this principle places the duty upon the Crown to show that the creation of strict liability is necessary to fight the contravention of the act. This allows the accused to also show the court that the creation of strict liability will not bring necessary relief. This is an issue that can be given due consideration when the development of our principle is considered. Australia's and Canada's understanding of strict liability is the same as South Africa and England's: the prosecution is only expected to prove *actus reus* of a prohibited act and rest. The system from these two countries, even though still influenced by English law, pushed the limits a bit further

[208] *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1984] 2 All ER 503 at 508.

by allowing the defence of due diligence. The defence is practised as part of their law on the principle of strict liability.

It therefore has to be admitted that although these countries create what is called reverse onus, at least they provide the accused with a fighting chance. It is, however, true that this approach contravenes the accused's right to a fair trial, the right to remain silent and privilege against self-incrimination but they allow the accused to state his case. Although this approach seems to appear to be a solution to the problem we are facing in South Africa, it will certainly encounter resistance in South Africa in view of the Constitutional Court decision in *S v Coetzee*. The court held that the reverse onus clauses sometimes have a tendency to breach people's fundamental rights entrenched in the Constitution.

It is a fact that strict liability has never been favoured by all legal systems around the world. The courts could only go as far as showing their disapproval of the application of this offence. However, the new South African Constitution has brought much awaited relief by providing the court with the power to declare all legislation that contravenes the Constitution invalid. Until such time that a decision comes from the Constitutional Court, uncertainties surrounding the principle will prevail. It was never the intention of this study to expect to obtain all the principles that could be used for the development of our principle from one legal system. All the systems will be considered and the favourable principles will be taken and combined with other principles to come up with one that will protect the public without violating the rights of the accused.

CHAPTER 4: STRICT LIABILITY OFFENCES AND SENTENCE

4.1 INTRODUCTION

The purpose of this study is to explore the purpose of sentence. The idea is to establish whether the sentencing or punishment of strict liability offenders serves the purpose of sentence. Crime and punishment are closely interrelated in that a crime is conduct in respect of which punishment is inflicted, while punishment is the sanction that is inflicted by the state upon a person who committed a crime.[209] It is important not to lose sight of the fact that crime and punishment are some of the basic concepts of criminal law.

Criminal law is defined by Burchell as the branch of national law that defines certain forms of human conduct as crimes and provides for the punishment of those persons with criminal capacity who unlawfully and with a guilty mind commits a crime.[210] This branch of the law, which also covers strict liability offences, indicates in its definition that persons who should be punished are those with a guilty mind. The most confusing issue is that strict liability offences, despite their element of disregarding the *mens rea* of the accused, is still regarded as forming part of criminal law which justifies a punishment or sentence.

4.2 THEORIES OF PUNISHMENT

Theories of punishment are regarded as being some form of justification for punishing offenders. It is based on the proper understanding of these theories of punishment that strict liability is vehemently objected to. There is substantial agreement that the two outstanding characteristics of punishment are: (a) intentional infliction of suffering upon an offender and (b) expression of the community's condemnation and disapproval of the offender and his conduct.[211] There are two basic theories of punishment and that is absolute and relative theory. Absolute theory is what is normally called retributive theory and its main purpose is punishment. It regards punishment as just deserts. Relative theory on the other hand regards punishment as means to achieve an aim.[212]

Under relative theory, we have reformative, preventive and deterrent theories and they all find their justification in the future, in the good that will be produced as a

[209] Rabie and Strauss *Punishment* 1.
[210] Burchell *Criminal Law* 1.
[211] Rabie and Strauss *Punishment* 8.
[212] King *Sentencing: General Principles* 23.

result of the punishment.[213] It is therefore important to note that these underlie the purpose of sentence and as indicated justifies punishment. Strict liability offences, like any other offences, make provision for punishing those who are found to have contravened the provisions. It is, therefore, imperative to go through the theories of punishment and establish whether they are able to justify the sentence imposed under strict liability offences.

4.2.1 RETRIBUTIVE THEORY

According to this form of theory, punishment is imposed for an offence that has already been committed. The punishment is imposed because it is regarded as just deserts, in other words, the accused deserves the punishment. Rabie in his explanation of retribution quoted from Gardiner as follows:-

> The desire to make the offender suffer, not because it is good for him (as when guilt is purged by suffering), not because suffering might deter him from further, but simply because it is felt that he deserves to suffer, is the essence of retribution.[214]

Rabie further makes mention of the most crucial aspect of criminal law when he indicates that it is a basic intention of retributivists that punishment is deserved only by people who have voluntarily and knowingly violated criminal law precepts.[215] In terms of this theory, a person who is receiving the just deserts must have had necessary *mens rea* when committing an offence in order to justify the imposition of a sentence. It is therefore very relevant to remember at this stage that strict liability offences do not require *mens rea* to have the person convicted – only *actus reus*.

The imposition of sentence under strict liability offences cannot be justified by this theory, as it cannot be said that a person who has taken necessary reasonable steps to avoid committing an offence deserves a punishment. Retribution presumes moral blame and the perpetrator gets what he or she deserves, therefore the punishment imposed is just deserts.[216]

4.2.2 THE REFORMATIVE THEORY

The reformative theory also forms part of a relative punishment theory. Prison often turns fallen angels into hard core criminals. It is therefore maintained that deserving

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[213] King *Sentencing* 27.
[214] Rabie and Strauss *Punishment* 4.
[215] Rabie and Strauss *Punishment* 5.
[216] King *Sentencing: General Principles* 20.

people should be given a chance to reform and mend their ways in order to become law-abiding citizens. Reformative theory focuses and, of course, places more emphasis to the person and his personal circumstances. This type of punishment has been provided to the youth usually through diversion programmes. The ultimate tool of this theory is to influence the future in the sense that the accused must be assisted to transform into a law-abiding citizen. According to King:-

> The reason for the commission of the offence may, according to this theory, be traced back to one or another personality disorder or to some other psychological factors, such as accident or broken family life or adverse influences which had an effect on the perpetrator. This theory's origin has a lot to do with the rising of sociological and psychological research of the past.[217]

The nature of strict liability offences makes it impossible to use this theory for justifying the punishment of the accused. Reformation concentrates on the mental status of an individual and research on what could have influenced his behaviour. It is pivotal here to keep in mind that strict liability offences do not necessarily consider the mental status of the person when they consider a person's conviction. It is practically impossible to attempt to reform a person who does not have a guilty mind.

There is also a value that every human life has meaning and worth, that there is a spark of good in everyone, even those who have chosen to break the laws of society.[218] However, such a statement does not include strict liability offenders, as a result of the lack of *mens rea* at the time of the commission of the offence. It is the aim of this study to show that this theory is also not the correct one to apply to a person convicted of a strict liability offence.

4.2.3 THE PREVENTIVE THEORY

This theory can be used as a way of preventing the individual accused of committing the offence again. The most important factor to consider in this instance is the safety of the community. The court often imposes incapacitating sentences were, it is of the view that the accused is a danger to the society. Before the introduction of Interim Constitution, the appropriate sentence would be the death sentence, the equivalent of which today is life imprisonment. A longer sentence of imprisonment, even though it is not life imprisonment may also serve this purpose. The preventive theory has the same effect as deterrence. Terblanche is of the view that:-

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[217] King *Sentencing: General principles* 32.
[218] Shestokas 2009 http://www.suite101.com/content/the -*purpose*-of-criminal-punishment-a101627 (20 October 2010).

> Apart from being strung with the other three purposes of punishment, prevention is rarely mentioned in our sentencing judgements. It can be used as in a wider or narrower sense. In the wider sense it includes deterrence and rehabilitation. Sometimes it is even used as a synonym for general deterrence, when courts state that the sentence should "prevent" others from committing similar crimes.[219]

It is at this juncture that we have to analyse the preventive theory to establish whether it can at least be used as a justification for imposing a punishment on the accused. The preventive theory is characterised by long sentences, the purpose of which is to ensure that the accused is incapacitated in an attempt to prevent him from continuing with his criminal behaviour. In terms of this theory, the sentence also has the effect of deterring other people from committing similar offences. There are thus some similarities between the aim of strict liability and preventive theory.

It is said that preventive theory is involved when there is a need to protect society.It is said that the harshness of strict liability in criminal law is generally tolerated as it brings practical benefits and is often used to provide a greater level of protection to the public where necessary.[220] According to one source:-

> Strict Liability is most often imposed for offences which carry relatively small maximum penalty, and it appears that the higher the maximum penalty, the less likely it is that the courts will impose strict liability. However, the existence of severe penalties for an offence does not guarantee that strict liability will not be imposed. In *Gammon* Lord Scarman held that where regulations were put in place to protect public safety, it was quite appropriate to impose strict liability, despite potentially severe penalties.[221]

In *B V DPP*, Lord Nichollas held that:-

> The more serious the offence, the greater is the weight to be attached to the presumption (that *mens rea* is required), because the more severe the punishment and the graver the stigma which accompanies a conviction.[222]

It is evident that it will be almost impossible to impose a harsh sentence on a strict liability offender in an attempt to prevent him from committing such an offence again in the future. The abovementioned statement is inspired by the fact that strict liability offences completely disregard the mental status of a person during the commission of the offence, as the person might have taken all necessary and reasonable steps to avoid the commission of the offence without success. In other words, this theory will not serve its purpose if it is imposed against a strict liability offender. The

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[219] Terblanche *Sentencing* 162.
[220] Anon 2010 http://www.e-lawresources.co.uk/strict-liability.php (08 October 2010).
[221] Anon 2010 http://vig.pearsoned.co.uk/catalog/uploads/Elliott_Criminal_C02.pdf (10 September 2010).
[222] *B v DPP* 2000 AC 428 at 464.

imposition of a preventive type of a sentence on a blameless person will prove to be nothing but unjust.

4.3 THE DETERRENCE THEORY

There is a belief that a harsh sentence may deter people from committing offences.[223] This theory focuses on general and individual deterrence. The aim with regard to individuals is to impose a sentence that will deter the individual from involving himself with crime. In other words, such a person is encouraged by the sentence to do everything in his power to avoid involving himself in crimes in the future. It should be taken into consideration that the fact that the person took every reasonable step available to avoid committing an offence is not sufficient to assist him to escape a conviction on the grounds of strict liability.

The same goes for general deterrence where the sentence imposed on a specific individual is expected to achieve the goal of deterring even "would be" offenders. People are deterred from actions when they refrain from carrying them out because they have an aversion to the possible consequences of those actions.[224] However, it serves no purpose to impose a sentence with a deterrent nature for offences that disregard the element of *mens rea*. Strict liability requires that the prosecution must prove an *actus reus* beyond reasonable doubt and a conviction will ensue. Consequently, it disregards the mental element of the individual and general public. Mental element can include ignorance of the law and unsuccessfully taking reasonable steps to avoid prohibited results from occurring. Terblanche opines that:-

> There is no doubt that, historically, deterrence has been the main aim of punishment ... "[t]he purpose of punishment, especially in the latter half of the seventeenth and earlier eighteenth century was seen as ... to prevent crime in the future by disabling particular offenders and terrifying others into obeying the law".[225]

This is the last theory of punishment that is being discussed in order to determine whether it will be best suited to justify punishment of strict liability offenders. The aim of this theory is to ensure that people refrain from committing crimes because of the harshness of the sentence. To achieve the aim of this theory of punishment, a person is required to make a decision to refrain from committing the offence, which requires a mental participation. A person cannot make a decision to refrain from

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[223] Terblanche *Sentencing* 160.
[224] *Anon* 2010 http://www.sagepub.com/upm-data/5144_Banks_II_Proof_Chapter_5.pdf (28 October 2010).
[225] Terblanche *Sentencing* 160.

committing an offence that will be inevitably committed regardless of the efforts taken to avoid it. The aim of this theory cannot be achieved by imposing a sentence of a deterrent nature on a person who lacks a guilty mind. The conclusion is that even this theory cannot serve as a justification for punishing strict liability offenders.

4.4 DISCUSSION OF S v ZINN

S v Zinn[226] produced what is famously known as the triad of *Zinn*. It provided some guidelines on what the court should consider when imposing a sentence. The triad of *Zinn* had a tremendous influence to the issues that must be considered by the court when considering the proper sentence. It held that the court must consider the personal circumstances of the accused, the seriousness of the offence and the interest of community. The emphasis by *Zinn* was that these three factors must be given the same weight; none of them should outweigh the other. These three factors are considered separately to determine whether they can also be given equal consideration by the court when sentencing a person convicted for strict liability offence.

Terblanche, when talking about basic principles of sentencing, indicates among other things that: -

> An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender, in other words, the sentence should reflect the blame worthiness of the offender, or be in proportion to what is deserved by the offender. These two factors: the crime and the offender are the first two elements of the triad of *Zinn*. An appropriate sentence should also have regard to or serve the interest of society, the third element of the *Zinn* triad. The interest of society can refer to the protection society needs, or the order or peace it may need, or the deterrence of would-be criminals, but it does not mean that public opinion must be satisfied.[227]

4.4.1 INTEREST OF THE SOCIETY

S v Zinn held that the court must consider the interests of society when imposing a sentence on the convicted accused.[228] Terblanche indicates that the sentence that takes into consideration the interest of the society is not the one that necessarily satisfies public opinion.[229] A practical example is the one of *S v Makwanyane,* where the Constitutional Court abolished the death sentence despite the public outcry

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[226] *S v Zinn* 1969 (2) SA 537 (A).
[227] Terblanche *Sentencing* 137.
[228] *S v Zinn* 1969 (2) SA 537 (A).
[229] Terblanche *Sentencing* 152.

against such abolition.[230] Accordingly, there is confusion as to when do we say the interest of the community have been best served by the sentence. This study will submit that the interest of the community is served when all the circumstances of the case have been given due consideration and an appropriate sentence which takes consideration of them all is imposed.

Terblanche quotes Du Toit, saying that the interest of the society can operate both to increase and decrease the punishment.[231] The community cannot, however, expect that the punishment be passed to a person who is morally blameless. De Groff refers to Justice Holmes, who outlined his concern about strict liability offences. Holmes held that: -

> To deny that criminal liability ... is founded on blameworthiness...would shock the moral sense of any civilized community ... a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community.[232]

It is therefore crucial that punishment should be meted out to people who deserve it, in other words to those who willingly participated in a prohibited act with full knowledge thereof.

4.4.2 SERIOUSNESS OF THE OFFENCE

Without doubt, the more serious the offence the more severe the sentence will be. Ashworth indicates that "the seriousness of an offence may be analysed in terms of the harmfulness or potential harmfulness of the conduct and the culpability of the offender".[233] Most writers like Ashworth acknowledge that *mens rea* of the person concerned deserves to be considered in order to determine the seriousness of the offence. Terblanche makes a reference to a Law Commission proposal of 2000, which provided what is said to be a modern approach to determining the seriousness of a crime.[234]

The approach was made up of two considerations, the first being the degree of harmfulness (or risk of harmfulness) of the offence, and secondly the degree of culpability of the offender.[235] Terblanche, like Ashworth, acknowledge the need to consider the element of culpability in order to determine the seriousness of the

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[230] *S v Makwanyane* 1995 (3) SA 391 (CC).
[231] Terblanche *Sentencing* 152.
[232] De Groff 2004 50 *Loy.L.Rev* 844.
[233] Ashworth *Sentencing* 161.
[234] Terblanche *Sentencing* 148.
[235] Terblanche *Sentencing* 148.

offence.[236] He goes further by saying that another potential source determining the seriousness of a particular crime is the view society may have of the crime.[237] The Minimum Sentence Act also indicates that, in order for a person to be sentenced to life imprisonment, such a person must have shown to have a premeditated plan to commit murder.[238]

Reference to the Minimum Sentence Act might appear to be irrelevant; however, it does show just how important *mens rea* is in determining an ultimate sentence. In other words, it is virtually impossible to consider the seriousness of the offence without making reference to the mental status of the accused. The absence of either intention or negligence will present a challenge to the presiding officer when he or she considers the seriousness of the offence for the purpose of sentencing. This leg of the triad of *Zinn* cannot provide guidance in as far as imposition of sentence on a person convicted for a strict liability offence is concerned, because of lack of the *mens rea* requirement for conviction.

4.4.3 PERSONAL CIRCUMSTANCES OF THE ACCUSED

A number of factors need to be considered when the personal circumstances of the accused are considered for the purpose of sentence. The age, employment status, dependants, health and, more importantly, the blameworthiness of the offender are some of the circumstances that require consideration before the imposition of a sentence. This process of looking specifically at the offender is often referred to as individualisation.[239] According to Terblanche:-

> The courts frequently refer to the blameworthiness or culpability of the offender as a measure of how severe the punishment needs to be. It is a useful question, in determining an appropriate sentence, to ask how blameworthy an offender is. If one offender is more blameworthy than the other, her sentence should reflect this and, thus, be more severe. Likewise, the less blameworthy an offender, the less severe should be her sentence.[240]

In this instance the background of the offender is considered as well as the circumstances that persuaded him to commit an offence. For instance, the accused is unemployed and stole food from the shop because he was hungry and he had no money to buy it. The fact that strict liability offences dispense with the element of

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[236] Terblanche *Sentencing* 149.
[237] Terblanche *Sentencing* 149.
[238] Criminal Law Amendment Act 105 of 1997 section 51.
[239] Terblanche *Sentencing* 150.
[240] Terblanche *Sentencing* 150.

mens rea deprives the presiding officers of an opportunity to consider the personal circumstances of the accused as guided by *Zinn* properly.

The blameworthiness of an individual is one of the most important and central points that the court must consider when it considers the personal circumstances of the accused. The failure of the court to give due consideration to the personal circumstances of the accused may be a ground for a successful appeal. As a matter of fact there are cases where the appeal succeeded based on the failure of the court to properly consider the personal circumstances of the accused.[241]

4.5 RESTORATIVE JUSTICE

Restorative justice is another concept that has emerged strongly lately. Our courts are of late encouraging restorative justice as another option for punishment. The following sentiments have been expressed on the subject:-

> Restorative justice may be considered unique in its emphasis on not just one component of the criminal justice system such as punishment, but as incorporating victims, offenders, and the community in its strategies and designs.[242]

In order for restorative justice to be effective, the offender, as in a diversion programme, is expected to genuinely admit guilt. However, it is futile to expect a person who is believed to be innocent to go through a process of reconciling with the victims and showing remorse for something he couldn't control. Restorative justice cannot be applied to strict liability offences for the same reason, that is, the exclusion of *mens rea* as an element of an offence.

4.6 SENTENCE AS A DETERMINING FACTOR

It has been argued that strict liability offences can also be determined by checking the sentence that could be imposed on conviction. Power indicates that:-

> The maximum penalty attaching to a crime is another indicator of whether it is to be read as requiring proof of *mens rea*. The more serious the offence, the greater is the weight to be attached to the presumption, because the more severe the punishment and graver the stigma which accompany a conviction.[243]

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[241] *S v Matoma* 1981 (3) SA 838 (A) at 842H; *S v Hermanus* 1995 (1) SACR 10 (A) at 12 g-h.
[242] Anon 2010 http://www.sagepub.com/upm-data/5144_Banks_II_Proof_Chapter_5.pdf (28 October 2010).
[243] Power 2010 http://webjcli.ncl.ac.uk/2000/issue2/power2.html (05 October 2010).

There is no guarantee that all strict liability offences will carry a lenient sentence.[244] It is thus hard to label a sentence imposed on the accused as just deserts despite his lack of *mens rea*. De Groff remarked on this issue as follows:-

> The emphasis on the moral character of the defendant's act and the wrongful state of his mind has long been understood to be an essential characteristic of the criminal law. With free choices comes moral accountability. Thus, the criminal law has historically been distinguished from its civil counterpart by virtue of the criminal law's role in moral education and its focus on sanctioning blameworthy conduct.[245]

4.7 ARGUMENT IN FAVOUR OF STRICT LIABILITY OFFENCES

The main argument that is normally raised as a justification for a strict liability offence is its lenient sentence. This argument is repeated by Erlinder when he remarks as follows:-

> It has often been argued that strict liability for acts which are *mala prohibita* is supportable in that it increases the prevention of the harm at which the prohibition is aimed, that relatively minor penalties are exacted for acts which are *mala prohibita*, and that, since such acts are not really criminal, traditional notions of criminal law theory do not apply.[246]

It is further argued that strict liability exists for the purpose of protecting the public. It raises standards where the health and safety of the public are at stake and forces those in a position of responsibility to take extra precautions.[247] It is said that it promotes enforcement of the law as it ensures more convictions are secured and does not allow people to escape liability through a fabricated account of their state of mind.[248] There is also a belief that strict liability can lead to people taking more care and can act as a deterrent to others.[249] The easy nature of its administration is another argument in favour of strict liability.

4.8 ARGUMENT AGAINST STRICT LIABILITY

It is evident that strict liability has been met with resistance since its inception and its deterrent nature has been called into question. Moreover, the unjust nature of these offences has been viewed with shock and disbelief. De Groff, quoting from La Fave,

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[244] Anon 2010 http://www.e-lawresources.co.uk/strict-liability.php (08 October 2010).
[245] De Groff 2004 50 *Loy.L.Rev* 844.
[246] Erlinder 1981 *Am.J.Crim.l.* 169.
[247] Anon 2010 http://www.e-lawresources.co.uk/strict-liability.php (08 October 2010).
[248] Anon 2010 http://www.e-lawresources.co.uk/strict-liability.php (08 October 2010).
[249] Anon 2010 http://www.e-lawresources.co.uk/strict-liability.php (08 October 2010).

emphasises in concurrence with La Fave that strict liability is both unfair and ineffective as a deterrent.[250] He further held that: -

> The consensus can be summarily stated to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future ... . It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy.[251]

Erlinder also supports the argument that strict liability is unjust. He remarks that:-

> [T]he distinctions between sanctions for acts which are *mala in se* and *mala prohibite* do not change the fact that the sanctions are criminal in essence and that criminal sanction, without blameworthiness have little support in either deterrent or retributive theory.[252]

The fact that strict liability offences can be easily administered cannot be equated with the stigma of being a convict. Such conviction can prove to be prejudicial to the business of a company and/or the career of an individual. A typical example is the case of *Callow v Tillstone* where a butcher was convicted for making unfit meat available for sale in his butchery.[253] This step was taken after the meat had been declared fit for human consumption by a veterinarian. Surely, such a conviction harmed the butcher as an individual, as well as his business. From a company point of view, the true cost of a prosecution includes items such as lawyers and wasted time, as well as bad publicity after the whole saga.[254]

In *R v Larsonneur*,[255] the defendant, who was a French national in possession of a passport which prevented her from working in the UK, was forced out of England. She then went to Eire where she was arrested and deported back to England. Upon her arrival in England she was re-arrested, charged and found guilty of being in England in contravention of the Aliens Act of 1920, an offence which was deemed to be of strict liability. It is clear that she had no intention of going to England and it would be unreasonable to expect her conviction to have had a retributive, rehabilitative, preventive and deterrent effect on her or other people.

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[250] De Groff 2004 50 *Loy.L.Rev* 845.
[251] De Groff 2004 50 *Loy.L.Rev* 845.
[252] Erlinder 1981 *Am.J.Crim.l.* 169.
[253] *Callow v Tillstone* (1900) 83 LT 411.
[254] Demetriou-Jones 2010 http://www.associatedcontent.com/article/2736259/strict_strict_liability_offences.html (28 October 2010).
[255] *R v Larsonneur* (1933) 24 Cri. Appl .Rep.74.

4.9 CONCLUSION

Like any aspect of the law, criminal law has its own basic principles and it is those principles that differentiate it from other aspects of the law or define it. Criminal law as defined earlier is the branch of national law that defines certain forms of human conduct as crimes and provides for the punishment of those persons with criminal capacity who unlawfully and with a guilty mind commits a crime.[256] The definition of criminal law outlines the requirements that must be met before an act can be classified as a crime. It states in no uncertain terms that such a person must have criminal capacity to start with and his action must be unlawful. The definition further covers the state of mind of the person who will be regarded as having committed a crime.

In this regard, it states that such a person must have a guilty mind. The reason why this is a requirement is because the definition provides for the punishment of the said person if it appears that all the requirements of the crime have been complied with. The punishment or sentence also has a certain purpose that it is required to serve or achieve. There are theories of punishment which are said to be in place to at least find a justification for imposing a sentence. The above discussion serves as a basis for the concern that this study is trying to address. In some quarters, this concern has been raised in regard to strict liability offences and the purpose that is served by the sentencing in terms of them.

Strict liability is commonly used to describe offences in which it is not open to an accused to avoid criminal liability on the ground that he acted under a reasonable mistake of fact which, if the facts had been as the accused believed them to be, would have made his act innocent. Strict liability only requires *actus reus* to be proved beyond reasonable doubt in order to secure a conviction. It promotes a total disregard of the person's *mens rea*. This approach is in total contrast with the basic principles of criminal law and renders the punishment that follows unjust. Frimpong also emphasises the importance of enquiring into the mental status of a person before he/she can be exposed to criminal conviction and punishment.

Frimpong says that no person may be convicted of a criminal offence unless it is proved beyond a reasonable doubt that he committed an act which constitutes a criminal offence, and his state of mind at the time when he committed the offence

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[256] *Burchell Criminal Law 1.*

was a guilty one.[257] There has been some admission by Milton and Fuller that no principle of criminal law is more firmly established than that which proclaims that *mens rea* is an element of all common law crimes.[258]

4.9.1 JUSTIFICATION OF SENTENCE

Theories of punishment have been labelled as being the justification of sentence. It would have been improper to ignore applying the theories of punishment to strict liability sentences to determine whether they can be justified. It is thus hard to find a justification for sentencing a person who took all reasonable steps to avoid the problem. It is even worse if the person was not even aware that he was committing an offence. One of the justifications offered for strict liability offences is the issue of the small penalty that is normally imposed. Such justification is not however within the ambit of the theory of punishment. Stuart remarks that for any type of offence where there is a possibility of imprisonment, even if only in default of payment of a fine, there must at least be the possibility of a due diligence defence.[259] This is an indication that criminal behaviour should not be determined by the sentence but by, among other things, the guilty mind. According to De Groff:-

> For one thing, the resort to strict liability statutes as a means of advancing the "greater public good" represents a significant shift from the criminal law's historic focuses on protecting individual rights. The use of strict liability might also lead to penalties that are disproportional compared with penalties associated with other forms of wrongful behaviour. This risk is heightened by the enormous discretion that a strict liability scheme places in the hands of the prosecutors.[260]

Closer scrutiny of the theories of punishment reveals that no single theory can be said to be applicable in terms of sentencing under strict liability. With regard to rehabilitation it is impossible to rehabilitate a person who lacks moral blameworthiness. Neither preventive nor retributive theory has been proven to cover strict liability offences. De Groff contributes to the condemnation of strict liability offences. He contends that a strict liability system does not advance its primary purpose of deterrence.[261] With reference to Justice Holmes's view that deterrence was the chief and only universal purpose of punishment, he further believes that some degree of culpability is important for making penal sanctions effective.[262]

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[257] Frimpong and Smith *Criminal Law* 3ed 3.
[258] Milton and Fuller *Criminal Law* 23.
[259] Stuart BCLR vol 4:13.
[260] De Groff 2004 *Loy.L.Rev* 843.
[261] De Groff 2004 *Loy.L.Rev* 844.
[262] De Groff 2004 *Loy.L.Rev* 844.

This study concurs with the contention by De Groff that if the criminal law loses its unique sense of moral blameworthiness, then the force behind the criminal sanctions might largely be destroyed.[263] Strict liability totally ignores the basic principles of criminal law. It further fails completely to associate itself with the principles of sentencing. Erlinder concurs with the view that strict liability offences attract lenient sentences for offences that lack *mens rea* and further indicates that acts which are covered by strict liability offences are not really criminal because traditional notions of criminal law theory do not apply.[264]

He reiterates further that the difference between the sentencing of offences that require *mens rea* and those that exclude it should not be allowed to hide the fact that they are all criminal sanctions. Davis contributed to this controversial subject by saying:-

> The problem posed by strict liability in the criminal law, then is that of explaining how the objective of strict liability statutes can justify any punishment at all or, in other words, how there can justly be a crime without fault, a crime without even the low-grade evil mind of negligence.[265]

In conclusion, the sentences that follow conviction of strict liability offences are unjust irrespective of how minor the penalty is. The concession by Erlinder that the nature of strict liability offences does not fit the nature of a crime is a confirmation that even the punishment is unjust.

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[263] De Groff 2004 *Loy.L.Rev* 844.
[264] Erlinder 1981 *Am.J.Crim.l.* 163.
[265] Davis 33 *Wayne L. Rev.* 1363 (1986-1987) 1373.

CHAPTER 5: NEW CONSTITUTIONAL DISPENSATION

5.1 INTRODUCTION

This study addresses the most important aspect of our South African law and aims to establish the relations between strict liability and the Constitution. Consequently, it interrogates strict liability offences to ascertain their compatibility with the Constitution. Strict liability relieves the state of its duty to prove that the accused was at fault when he committed the offence and creates what is called "reverse onus". The implications of reverse onus is that the state is only required to prove *actus reus* beyond reasonable doubt and the accused would be expected to advance evidence to show that he was not at fault, probably by proving that he did not act voluntarily. It will be proper at this stage to make some reference to the Constitution and its expectations.[266]

It is important when dealing with issues that might probably be in conflict with the Constitution to have the provisions of section 2 in mind. Such provision reads as follows: "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[267] The effect created by strict liability offences is that it takes away the right of the accused to remain silent and to be presumed innocent entrenched in the Constitution.[268] It is certainly so that taking this right away from the accused will have an impact to his right to fair trial which is also provided for in the Constitution.[269]

The introduction of the Constitution brought with it a huge responsibility to our law to align itself with it. It had a direct impact on the criminal law when it introduced section 35, which encompasses the rights of arrested, detained and accused persons. This section further gave content to the right to fair trial which existed before the Constitution but was approached differently by the courts. It was then at the discretion of the court to decide whether the trial was handled in a manner which is unfair to the accused or the evidence gathered illegally should be admitted. Section 35, however, removed the uncertainties of when can we say the accused's right to fair trial has been infringed.

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[266] *Constitution of the Republic of South Africa* Act of 1996. This Act will herein after referred to as 1996 Constitution.
[267] 1996 *Constitution* section 2.
[268] 1996 *Constitution* section 35(3)(h).
[269] 1996 *Constitution* section 35(3).

Strict liability offences are classified as falling under criminal law, which implies that the provisions of section 35 are applicable.[270] Consequently, the accused deserves

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[270] **S35 of 1996 Constitution reads as follows: Arrested, detained and accused persons**

1. Everyone who is arrested for allegedly committing an offence has the right
    a. to remain silent;
    b. to be informed promptly
        i. of the right to remain silent; and
        ii. of the consequences of not remaining silent;
    c. not to be compelled to make any confession or admission that could be used in evidence against that person;
    d. to be brought before a court as soon as reasonably possible, but not later than
        i. 48 hours after the arrest; or
        ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
    e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
    f. to be released from detention if the interests of justice permit, subject to reasonable conditions.
2. Everyone who is detained, including every sentenced prisoner, has the right
    a. to be informed promptly of the reason for being detained;
    b. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
    c. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
    d. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
    e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
    f. to communicate with, and be visited by, that person's
        i. spouse or partner;
        ii. next of kin;
        iii. chosen religious counsellor; and
        iv. chosen medical practitioner.
3. Every accused person has a right to a fair trial, which includes the right
    a. to be informed of the charge with sufficient detail to answer it;
    b. to have adequate time and facilities to prepare a defence;
    c. to a public trial before an ordinary court;
    d. to have their trial begin and conclude without unreasonable delay;
    e. to be present when being tried;
    f. to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
    g. to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
    h. to be presumed innocent, to remain silent, and not to testify during the proceedings;
    i. to adduce and challenge evidence;
    j. not to be compelled to give self-incriminating evidence;
    k. to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
    l. not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
    m. not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
    n. to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
    o. of appeal to, or review by, a higher court.

to exercise his/her right to remain silent, to be presumed innocent and to legal representation which will eventually impact on the accused's right to fair trial. The reason for introducing section 35 in the Constitution was to ensure that the accused are accordingly protected when they go through a criminal trial as a result of the consequences that will follow if they are convicted. However, the introduction of the Constitution did not have any significant impact on the strict liability principle. The purpose of introducing strict liability was to assist the prosecution in convicting the accused where it would be difficult to prove an element of *mens rea*.

The reason for creating strict liability offences certainly goes against the notion promoted by section 35(1)(a) and 35(3)(h). The aforementioned section confers the accused with the right to remain silent, to be presumed innocent and not to testify during the proceedings. These sections emphasise the importance of allowing the state to discharge its onus of proving the case against the accused beyond reasonable doubt, failing which the accused should be discharged. It is therefore not the duty of the accused to assist the state in proving its case against him/her. Strict liability relieves the state of the duty of proving those elements that it has a difficulty of proving. It is a disturbing idea to think of what would happen to the criminal justice system if elements of the offence were to be eliminated only because they present a challenge for the state to prove.

The fact that such rights are contravened does not necessarily mean that strict liability must be declared unconstitutional. The Constitution also makes provision for a limitation clause which provides that the rights in the Bill of Rights can be limited; such rights are limited by a law of general application. The provision also goes further by saying the limitation must be reasonable in an open democratic society based on human dignity, equality and freedom.[271] Generally, legislation that creates strict liability does not do so in a clear manner and the courts are required to interpret such a piece of legislation in order to determine whether it creates strict liability.

4. Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
5. Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[271] 1996 *Constitution* section 36

The Constitution also gives guidance on how to interpret such legislation in such a manner that it does not offend the provisions entrenched in the Constitution. Section 39 says: -

> (1) When interpreting the Bill of Rights, a court, tribunal or forum
> (a) must promote the spirit purpose and objects of the Bill of Rights.
> (b) must consider international law; and
> (c) may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights.[272]

It is the purpose of this study to establish whether the interpretation of a piece legislation to create strict liability can pass the constitutional test. It is further the purpose of this study to determine whether the limitation of the rights of the accused in terms of the limitation clause is reasonable and justifiable in an open and democratic society. Snyman also acknowledges that uncertainty exists about the constitutionality of strict liability offences in South Africa.[273] It will also be the aim of this study to determine whether the reverse onus created by strict liability can pass the constitutional muster.

5.2 STRICT LIABILITY PRE-1994

Before the coming into operation of the Constitution, our South African legal system was based on parliamentary sovereignty. The parliament had powers to enact legislation that would affect other people's rights adversarily and the court could not review such legislation unless the person implementing the legislation acted *ultra vires*. Strict liabilities are known to be regulatory offences, which simply mean that they can only be created by statutes. The court can therefore only review legislation's procedural flaws but not the contents thereof. The parliament was the legislature and the centre of power.

The parliament had some ways in which to prevent the court from pronouncing on any decision taken as a result of legislation enacted by it. Access to court was therefore limited, if not completely unavailable, to some people. The use of ouster clauses was one of the tools that were used by the parliament to put the legislation

[272] 1996 *Constitution* section 39.
[273] Snyman *Criminal Law* 246.

beyond the reach of the courts and judicial review. Currie elaborates on ouster clauses as follows:-

> Ouster clauses are provisions in legislation that seek to exclude the common law review jurisdiction of the courts. The significance of this protection can only be understood when one remembers that in the old South Africa, ouster clauses were particularly heavily relied upon in security and immigration legislation. A typical example was S29(6) of the internal security Act 74 of 1982: no court of the law shall have jurisdiction to pronounce on any action taken in terms of this section, or to order the release of any person detained.[274]

The authorities took advantage of the system that was in place which provided them with unlimited power under parliamentary sovereignty to use state resources to pursue their personal agendas. Therefore, the court could not declare the legislation that created strict liability offences invalid based on the contents thereof but only on procedural fairness.

5.3 STRICT LIABILITY AFTER 1994

The Constitution brought with it a significant change to the centre of power.[275] The 1996 Constitution introduced section 2, which made the Constitution the supreme law of the country. The Constitution further brought along some responsibilities and obligations. Accordingly, it emphasised that obligations imposed by the Constitution must be fulfilled. My main focus at this moment will be mostly on the provision of section 35 3(h) of the Constitution.[276] Section 35 focuses on the rights of arrested, detained and accused persons and is the section that deals with evidence obtained in violation of the accused's constitutional rights.[277] It automatically follows that people who are accused of committing strict liability offences are also entitled to enjoy the benefits of the rights provided in the provisions of section 35.

The rights covered by section 35 3(h) are threefold. Firstly, it is the right to be presumed innocent; secondly, the right to remain silent and, thirdly, the right not to testify against oneself. However, the reverse onus created by strict liability offence will certainly make it difficult to remain silent. Section 34 of the Constitution opened doors for people who have disputes that can be resolved by the application of law to have such disputes decided in a fair public hearing before a court, or where

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[274] Currie and De Waal *Handbook* 708.
[275] 1996 *Constitution*.
[276] 1996 *Constitution*.
[277] Du Toit and others *Procedure* 24-56G.

appropriate, another independent and impartial tribunal forum.[278] Currie quotes Ackermann J in *Bernstein v Bester* where he remarks about section 22, the equivalent of section 34. Ackermann J held that:-

> It is a provision fundamental to the upholding of the rule of law, the constitutional state, the *regstaatidee*, for it prevents legislatures, at whatever level, from turning themselves acts of legerdemain into `courts`... By constitutionalising the requirements of independence and impartiality the section places the *nature* of the courts or other adjudicating fora beyond debate.[279]

Section 34 was enacted solely for the purpose of targeting the practice which existed in apartheid law of ousting the court's jurisdiction to enquire into the legal validity of certain laws or conduct.[280]

5.4 PRESUMPTION OF INNOCENCE

The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in section 11(d) of the Canadian charter of Rights and Freedoms, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in section 7 of the charter.[281] In terms of South African law, presumption of innocence simply means that the state has a duty to prove all the elements of the offence beyond reasonable doubt. In strict liability offences the state is not expected to prove fault on the part of the accused. The proof of *actus reus,* as already indicated, is sufficient to secure a conviction provided the accused advances reasons to show that he was not at fault. The application of strict liability deals away with the traditional approach to the onus of proof in a criminal litigation which rests solely on the state. Langa J in *S v Coetzee* held that:-

> Discharging the burden of proof is a function which the criminal justice system requires the prosecution to perform in the normal course with regard to many common law and statutory offences.[282]

The accused's right to remain silent and to be presumed innocent is best protected by allowing the state to take its responsibility of discharging the onus vested on it of proving the guilt of the accused beyond reasonable doubt. Relieving the state of the duty of proving the mental status of the person during the commission of the offence,

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[278] 1996 *Constitution*.
[279] Currie and De Waal *Handbook* 704.
[280] Currie and De Waal *Handbook* 705.
[281] Canadian Charter of Rights and Freedoms Part I OF THE Constitution Act, 1982
[282] *S v Coetzee* 1997 (1) SACR 379 (CC) 385a-b.

would bring the criminal justice system into disrepute. Sachs J held in *S v Coetzee* that: -

> ... the presumption of innocence, ... serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence's one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption ... the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial cases.[283]

The presumption of innocence was introduced to the South African law by the English law. In *R v Oakes* the Chief Justice remarks as follows about the presumption of innocence*:* -

> The presumption of innocence protects the fundamental liberty and human dignity of any person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of consequences, presumption of innocence is crucial. It ensures that, until the state proves an accused guilty beyond reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in human land, it reflects our belief that individuals are decent and law abiding members of the community until proven otherwise.[284]

The test that is applied in a criminal trial is that the state is supposed to prove the case against the accused beyond reasonable doubt. The accused, on the other hand, has a right to remain silent, which is the right that flows from the presumption of innocence. It is advisable to consider the rationale behind the presumption of innocence with strict liability offences in mind. It is further important not to lose sight of what would be called two types of strict liability offence. The first is one that requires the proof of *actus reus* without the statute creating a special defence and the one that empowering legislation creates specific defences.

The issue of the application of the Bill of Rights into our criminal law and procedure was a matter of discussion by the South African Law Commission. The presumption of innocence among other rights was discussed. The commission held that:-

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[283] *S v Coetzee* (1997) 3 SA 527 (CC) para [220].
[284] *R v Oakes* 1986 50 CR (3d) 1 (SCC) 212-213.

> It can be argued that the scope of the presumption of innocence as a constitutionally entrenched right in s 35(3)(h) of the Constitution, requiring the prosecution to prove guilt beyond a reasonable doubt at trial, is restricted to proof of those elements of the state's case that must be established in order to justify punishment. The relevance of evidence should also be proved beyond a reasonable doubt in order to ensure the consistent application of the reasonable doubt standard. The blameworthiness of the accused is the underlying justification for punishment. Consequently, facts necessary to establish legal guilt but not pertinent to blameworthiness need not be established beyond reasonable doubt in terms of the presumption of innocence, which reflects society's tolerance of erroneous acquittals in an attempt to ensure that only the truly blameworthy are convicted. However, there may be circumstances where the value given to other rights demands that the reasonable doubt rule be applied independently of the presumption of innocence. The constitutional right to be presumed innocent is specified in relation to the right to a fair trial. It therefore does not apply to proceedings outside the definition of a criminal trial. However, when imprisonment is a possible result of "other proceedings" the residual content of the s 12(1) right to freedom and security, requiring procedural fairness, may well require the application of the reasonable doubt standard.[285]

The above statement by the Law Commission emphasises the importance of proving the blameworthiness state of the mind of the accused during the commission of the offence. The Law Commission, when making the said statement, was tackling the issue of presumption of innocence. The Commission even went further to indicate that the punishment of the accused can only be justified by his blameworthy state of the mind during the commission of the offence.[286] The reason for introducing strict liability offences was said to have been for public welfare. However, the Commission correctly indicated that society is more tolerant of the mistaken acquittals rather than the convictions of the innocent. The rationale for the presumption of innocence as per *Currie*: -

> ... ranges from a concern that individual rights need to be protected from the potentially coercive authority of the state to policy concerns directed at maintaining the legitimacy of the criminal justice system and the normative force of the criminal law. Despite the range of rationale it has at its centre recognition that the presumption of innocence is necessary to reduce the possibility of erroneous convictions. Erroneous convictions are also seen as an indicator of the existence of a coercive state.[287]

The principle of presumption of innocence in a constitutional perspective seems determined to achieve the system characterised by fairness and justice. Currie even emphasises that the rationale is to reduce the possibility of convicting the wrong people. He goes further by saying: -

> The rationale for the presumption of innocence finds expression in the reasonable doubt standard. The reasonable doubt standard demands that

[285] Law commission Project 101 3.
[286] Law commission Project 101 3.
[287] Currie and De Waal *Handbook* 746.

> the burden of the proof rests on the prosecution to prove the guilt beyond reasonable doubt.[288]

The guilt referred to in this instance is the one that is known under the normal principles of criminal law. This is the one that considers the blameworthy state of mind of the accused during the commission of an offence. Currie has an interesting choice of words when he deals with the aspects of presumption of innocence, which makes it challenging and difficult to choose certain information over the other. He says the rationale is also to reduce the possibility of erroneously convicting someone.[289] The statement already triggers the question of when do we say there was an erroneous conviction.

Erroneous conviction follows if an innocent person is convicted. An innocent person is the one who lacks *mens rea* or a guilty mind. Applying this theory to strict liability offences leaves one with no option but to accept that convictions under strict liability are erroneous and therefore in conflict with the spirit of the Constitution as far as *mens rea* is not an element. The requirement of proof of the accused's mental state during the commission of an act which amounted to an offence has come a long way in our legal system. In the case of S v Adams, Corbett JA held that:-

> Moreover, under s 2(1) (Act 71 of 1968) the onus is clearly on the State to prove that the accused person was in possession of a dangerous weapon, and this onus would include the burden of establishing beyond a reasonable doubt the existence at the relevant time of this mental element.[290]

Currie expresses his view about the correlation between the rationale for the presumption of innocence and reasonable doubt as follows:

> Although the reasonable doubt standard is less a precise formula than it is a symbol it satisfies certain imperatives. It offers society assurance that people innocent of crime shall not be convicted and although it creates an inevitable margin of error, our society [has determined] that it is far worse to convict an innocent man than to let a guilty man go free. Second, the reasonable doubt standard protects the individual against the state`s considerable resources and its potentially oppressive power to secure the conviction of the essentially powerless defendant. Perhaps most important, the reasonable doubt standard has captured society's belief in the security of its own standard of criminal justice. "[I]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt, whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affair have confidence that his government cannot adjudge him guilty of a criminal

[288] Currie and De Waal *Handbook* 746.
[289] Currie and De Waal *Handbook* 746.
[290] *S v Adams* 1986 (4) SA 882 (A) 891G-I.

> offence without convincing a proper fact finder of his guilt with utmost certainty".[291]

5.5 WHEN IS PRESUMPTION OF INNOCENCE INFRINGED?

The mere placing of the burden of proof on the accused does not raise rights issues. The standing committee held that:-

> The rights issues arises whenever the offence provision places on a defendant a burden to establish to the court that he or she did not commit one of the physical elements of the offence, or did not intend to commit the acts that make up the physical elements of the offence, and intended to do so, gives rise to an incompatibility with HRA section is18 and /section 21.[292]

Zeffert is of the view that the evolution of the presumption of innocence to constitutional right is a signal that it should be liberated from legislative oppression and allows it to regain the ground lost during the years that strict liability was still allowed.[293] He also attempts to define the test to be applied in the process of determining the time when presumption of innocence can be set to be infringed. He remarks on the decision of Kentridge AJ in the case of Zuma as follows: -

> Kentridge AJ who delivered the anonymous judgement of the court acted and approved what had been laid down in Downey namely that the presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of the reasonable doubt, and that it is infringed whenever the accused is required to establish on a balance of probabilities either an element of an offence or an excuse.[294]

5.6 REVERSE ONUS

The expectation that the state is only required to prove *actus reus* beyond reasonable doubt has the effect of forcing the accused to bring all sorts of evidence to prove that he was not at fault. This evidence is brought despite the fact that the state never put any evidence forward to prove fault. It is not always guaranteed that the successful proving of lack of fault by the accused will see him being acquitted unless the legislature creates the defence of due diligence. The view that this study has is that reverse onus in the true sense can never be justified. The issue of reverse onus has always been a matter of constitutional concern, with this being confirmed by the court in *S v Manamela,* where Madala, Sachs and Yacoob JJ held that:-

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[291] Currie and De Waal *Handbook* 746.
[292] Standing Committee Report 7 2008 77.
[293] Zeffert *Evidence* 180.
[294] Zeffert *Evidence* 176.

> The crux of the issue which falls to be determined is whether the reverse onus provision contained in s 37(1) is consistent with the constitutionally entrenched right to a fair trial and, in particular, s 35(3)(h) of the Constitution which guarantees the right to be presumed innocent, to remain silent, and to testify during the proceedings ... Section 37(1) therefore, not only places on the accused the burden of proving the requisite *mens rea* on a balance of probabilities, but introduces a further departure from the common law.[295]

Strict liability offences are regarded as being regulatory offences with less stigma on conviction and less severe sentence. Zeffert approvingly, without questioning the constitutionality of the reverse onus of those offences, outlined what should be considered in order to determine whether it is justified to impose reverse onus on the accused. He held that: -

> Factors that the court would consider in order to determine whether the reverse onus is justified would include considering whether the legislature was aimed at great trivial social evil, whether the offence is truly criminal not merely regulatory, the severity of the punishment, the consequence for the accused of a conviction and whether means less damaging to constitutional rights and not have achieved the desired end.[296]

The burden of proof means a duty on someone to prove a certain element or defence of the offence either beyond reasonable doubt or on a balance of probabilities. Section 372(5) of the criminal procedure expects the accused in order to avoid conviction in terms of the strict liability offence to raise a certain kind of defence. The section provides:

> When an offence has been committed, whether by the performance of any act or by the favour to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director of servant of a corporate body shall be deemed to be guilty of the offence, unless it is proved that he did not take part in the commission of the offence and he could not have prevented it, and shall be liable to prosecution therefore either jointly with the corporate body or apart there from, and shall on conviction be personally liable to punishment thereof.[297]

The duty to prove the contrary is not placed on anyone but the accused. The state is required to prove that the accused was either the servant and/or the director of the company at the time of the commission of the offence and then rest. Subsequently, the onus rests on the accused to prove his defence, failing which he will be convicted of an offence. It should be kept in mind that there are strict liability offences that explicitly create defence and there are those ones that do not, in other words the

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[295] *S v Manamela* 2000 (1) SACR 414 (CC) 420d & 425 f.
[296] Zeffert *Evidence* 176.
[297] *Criminal Procedure* Act 51 of 1977.

proving of due diligence is not always a reasonable defence. *S v Coetzee*[298] dealt with the case that involved section 372(5) of the Criminal Procedure Act.

As *Snyman* indicated, it is still uncertain whether strict liability is unconstitutional or not.[299] Such uncertainty is brought by the fact that the Constitutional Court is yet to decide on the constitutionality of strict liability offences. In *S v Coetzee* the court only concentrated on strict liability pertaining to that specific case and the circumstances under which it was imposed. However, the view of the judges will give us the guidance of what is the attitude of constitutional court towards strict liability. The court also considered the provision of section 245 of the Criminal Procedure Act which reads as follow: -

> If at criminal proceedings of which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such a representation to be false.[300]

O'Regan J's attitude in *Coetzee* reflects clearly her sentiment about reverse onus and strict liability offences. She held that: -

> We have stated on several occasions that the nub of the protection provided by Section 25(3)(c) is to ensure that people are not convicted of an offence where a reasonable doubt exists as to their guilt. Guilt is only established when it is clear that the accused has no defence and that all the particular crime has been established. If an accused person can be convicted despite the existence of a reasonable doubt either in relation to one of the elements of the offence or one of the elements of defence and a court is compelled to convict because of a reverse onus provision, the presumption of innocence is breached.[301]

Fraser also contributed to this controversial topic.[302] He made reference to a case of *Peka v Police* where the offence of disqualified driving was classified as a public welfare offence and therefore a strict liability under the category of *Civil Aviation Department v Mackenzie*.[303] This approach regarded it as sufficient proof that the accused drove while disqualified. However, it left it open to the accused to avoid being held criminally liable by proving that he was totally unaware that he was disqualified. The approach does not expect the state to prove an element of fault but

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[298] *S v Coetzee* (1997) 3 SA 527 (CC).
[299] Snyman *Criminal law* 243.
[300] *Criminal Procedure* Act 51 of 1977.
[301] *S v Coetzee* (1997) 3 SA 527 (CC) para 189.
[302] Fraser 1988 *Otago L.Rev* 665.
[303] *Peke v Police* M 145/85, *Civil Aviation Department v Mackenzie* [1983] NZLR 78.

requires the accused to prove the absence of fault failing which the conviction will ensure.

A perfect definition of reverse onus was submitted by Peter Bayne when he held that: -

> An offence provision "reverses" the onus of proof where it casts on the defendant an obligation to carry either an evidential or legal burden of proof in respect of the existence (or non-existence) of some fact. The strict liability offence and the absolute liability offence are but examples of a provision that `reverses` the onus of proof in this way.[304]

5.7 THE RIGHT TO REMAIN SILENT AND PRIVILEGE AGAINST SELF INCRIMINATION

He who alleges must prove. This is a saying that the right to remain silent and privilege against self incrimination professes. These are now both constitutional principles, as they are entrenched in the Bill of Rights.[305] The right to remain silent together with privilege against self incrimination comes a long way and their contraventions saw the conviction and sentence being set aside in some cases.[306] The significance of these rights is emphasised by the requirement that suspects must be informed of their rights as early as during the period of an arrest. Both these rights, even though they are explained during the time of arrest, are meant to achieve one goal to ensure that the accused receives a fair trial.

The right to remain silent warns the suspect or the accused to refrain from saying anything that might possibly be adverse to his case. Privilege against self incrimination, on the other hand, covers both incriminating conduct and statements. Strict liability offences without doubt are in sharp contrast to the Constitution as far as these rights are concerned. The provision of reverse onus for the accused in strict liability offences forces the accused to put forward the evidence in an attempt to prove lack of fault where a provision for such defence is made. The accused unwillingly waives his right to remain silent in fear of conviction.

The right to remain silent is not a non-derogable right; it can be waived by the accused or the evidence may still be accepted despite being obtained in

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[304] Standing Committee Report 7 2008 29.
[305] 1996 *Constitution* Section 35(3)(h).
[306] *Miranda v Arizona*, 384 US 436 (1966).

contravention of this right, depending on the circumstances of each case. In *S v Thebus,* Yacoob J held that: -

> In the exercise of the duty to ensure a fair trial, it would become necessary to balance the rights of the accused, the rights of the victims and the society at large. The right to silence of the accused would well become implicated in this balancing exercise when the judicial officer makes decisions concerning the admissibility of evidence, the allowing of cross examination as well as the drawing of inferences. Indeed inference arising out of the silence cannot ordinarily be drawn unless there is evidence of the silence of the accused and evidence of the circumstances surrounding that silence. Any investigation around the accused silence cannot be said to infringe his right to silence unless the trial is there by rendered unfair. The same goes for all decisions concerning admissibility of evidence as well as the use of silence in the drawing of inferences. The fairness of the trial as an objective is fundamental and key. The right to silence can only be infringed if it is implicated in a way that renders the trial unfair. It is a contradiction in terms to suggest that the right to silence has been infringed if it is implicated in a way that does not compromise fairness of the trial but enhances it.[307]

The result of remaining silent in a strict liability offence is a conviction irrespective of whether there is a doubt as to the fault on the side of the offender as long as it is proved that the act was committed willingly. It is even safe to say that the right to remain silent does not apply in strict liability offences. Either the accused is forced to rebut the element that the state was not expected to prove or the explanation provided is useless where no special defences were created. In a strict liability offence the accused cannot benefit from the provision of section 174 that offers the accused the benefit of the weakness of the state's case.[308] The provision reads as follows: -

> If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in a charge or any offence of which he may be convicted on a charge, it may return a verdict of not guilty.[309]

This section provides the notion that the accused has a right not to give evidence that incriminates him. It, therefore, allows the accused to be found not guilty without him being forced to take the stand against weak evidence of the state against him. Taking the stand under those circumstances might expose the accused to a cross examination that would supplement the state case and invite his conviction.

Davis refers to *S v Shangase* saying:-

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[307] *S v Thebus* 2003 (6) SA 505 (CC) para 109.
[308] Criminal Procedure Act 51 of 1977.
[309] Criminal Procedure Act 51 of 1977.

> Levingson J noted that the fundamental rights contained in section 25(2)(a), 25(3)(c) and section 25(3)(d), which embody the presumption of innocence and the right to remain silent, are the very pillars of a criminal justice system in an open and democratic society.[310]

He further borrows from the honourable Levinson J on the same Shangase matter saying:

> ... Levinson J held that a necessary corollary to the right to remain silent is the entrenched right that no one shall be compelled to make a confession or admission (at 46 A-B). The court also held that, where it is alleged that a person who made a statement purporting to give up his right to remain silent, the onus shall be on the state. The state should prove beyond a reasonable doubt that a person has, in fact, not been compelled to waive the fundamental rights that the Constitution affords him.[311]

The case of *S v Shangase* dealt with the fairness of the provisions of section 217(1) (b) of the Criminal Procedure Act.[312] The provision provides that where the confession was made to a magistrate and reduced to writing, such confession shall by mere production be regarded as admissible and be presumed to have been freely and voluntarily made without undue influence and the accused was in his sound and sober senses when he made it. However, this presumption obviously denies the accused the right to remain silent and allows the state to prove that the confession was properly taken. This is the very same effect that strict liability has on the accused.

Levinson J in *Shangase* maintains that:-

> A presumption of this nature strikes at the very heart of the fundamental rights entrenched in section 25(2)(a) and 25(2)(c), as well as the right to have a fair trial. This is not simply a case of a legislative device to facilitate proof by the state of an evidentiary fact in a case. In my judgement, it, in fact, deprives the accused of his right, which I found to exist, and that is to require the state to prove that he has waived his right to remain silent and, without compulsion, made a confession or admission.[313]

It would be absurd to go against the Constitution and continue to nurture the aspect of the law that was introduced before the Constitution was enacted despite conflict with the provisions thereof.

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[310] Davis *Fundamental Rights* 180.
[311] Davis *Fundamental Rights* 176.
[312] *S v Shangase* 1994 (2) BCLR 42.
[313] *S v Shangase* 1994 (2) BCLR 42 (D) para 46H-I.

5.8 THE RIGHT TO A FAIR TRIAL

The right to fair trial existed even during the period prior to the introduction of the Constitution. However, the approach to this right differed from the constitutional era approach. At that time, the test for admitting evidence was relevance and the court had the discretion to disallow admission of evidence if it was of the view that admission thereof would render the trial against the accused unfair.[314] The courts favoured the inclusion rather than exclusion of the evidence obtained in violation of the accused's right to fair trial. The introduction of the Constitution has had a tremendous impact to the right to fair trial as it was applied in the pre-constitutional era and has influenced both the content and the approach to the right. Ackerman J, when dealing with the right to fair trial in *S v Dzkudu*; *S v Thilo,* held that:-

> The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified elements of the right to fair trial, the specified elements being those detailed in ss(3) ... It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purpose of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests in the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.[315]

The right to a fair trial encompasses the observation of the presumption of innocence and the right to remain silent, among other things. Kentridge AJ held in *S v Zuma* that:

> The right to a fair trial conferred by (S 25(3)) is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the constitution came into

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[314] Shwikkard and Van Der Merwe *Evidence* 205.
[315] *S v Dzukuda*; *S v Thilo* 2000 2 SACR 443 (CC) para 9 & 11.

> force ... it is now for all courts hearing criminal trials or criminal appeals to give content to those notions.[316]

This study is of the view that the negative impact of strict liability to the right to remain silent and the right to be presumed innocent, poses a serious threat to our jealously guarded Constitution. Kentridge AJ further held in *Coetzee* that: -

> The applicants` second and alternative submission requires more detailed consideration. They contend relying on a line of cases in the supreme court of Canada, that once a criminal statute contains a reverse onus provision in the sense of a provision requiring the accused to provide proof of some fact in order to escape conviction, it is irrelevant whether that onus relates to an essential element of the offence or to a defence by way of excuse of exemption. In either case the presumption of innocence is destroyed and the fairness of trial impaired.[317]

The abovementioned comments were made by the court because of the submission by the government that the reverse onus did not require the accused to testify about any element of the offence but his defence. This argument by the government overlooked the fact that the accused raised the defence to rebut an element of fault that was never even proven by the state. In some instances, where the legislature does not explicitly provide for any special defence against strict liability offences, the accused will be making fruitless attempts to prove his innocence.

5.8.1 THE IMPACT OF STRICT LIABILITY ON THE RIGHT TO LEGAL REPRESENTATION

It is the purpose of section 35 of the Constitution to ensure that, among other things, the accused's right to legal representation is observed. The right to legal representation is regarded as being central to the right to fair trial. The Constitution guarantees every accused who appears before the court the right to have legal representation of his own choice or one that will be paid for by the state.[318] This assurance by the Constitution reflects the crucial part that is played by legal representation in a criminal justice system. De Villiers quotes Steytler when he explains the purpose of the right to legal representation as follows:-

> The right to a lawyer is an essential feature of the right to a fair trial as lawyers play a critical role in ensuring that the accusatorial system, the foundation of a fair trial in the common-law tradition, produces a just result. In an adversary system a court's decision rests primarily on the evidence and arguments advanced by the parties and the system is predicated on the assumption that parties will protect their own interest through their vigorous

[316] *S v Zuma* 1995 (4) BCLR 401 (SA) (CC) 411G-412A.
[317] *S v Coetzee* (1997) 3 SA 527 (CC) para 90.
[318] Constitution s 35(f).

> participation in the proceedings. A fair adversary system is thus dependent on the prosecutor and the accused participating fully and effectively in order to produce a just decision. Because effective participation requires legal knowledge and courtroom skills, accused need the assistance of lawyers who have such knowledge and skills. With the constitutionalisation of criminal of criminal procedure, the need for legal assistance is even greater; not only is a fair trial likely to emerge through skilled participation, but other constitutional rights, such as privacy, can also be vindicated through the criminal process.[319]

The application of strict liability in our legal system renders the presence of legal representation useless. It is important to keep in mind that strict liability requires the state to prove that the accused acted wilfully. It is based on the statement that this study advances the argument that the effects of strict liability on the right to legal representation are tantamount to the denial thereof. The right to legal representation is not observed by merely having the body available in court, but it is based on the said body applying its legal knowledge and skills to present the case of the accused. The fact that the prosecution has an unfair advantage over the accused, in that it is relieved of its duties to prove an element of *mens re,* impacts directly on the right of the accused to a fair trial. The presence and/or absence of the legal representation in a strict liability offence is less significant in that the accused will still be convicted if it is proven that he acted willingly even though he lacked *mens rea*.

5.9 CONCLUSION

The purpose of this study is to determine the constitutionality of strict liability offences. The confusing issue about strict liability offences is the fact that they produce different results which makes it difficult to follow the principles properly. O'Regan J in *Coetzee* quoted from *Sheras v De Rutzen* as follows: -

> There is a presumption that *mens rea*, an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence, but that presumption is liable to be displaced either by words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.[320]

The position before the Constitution was considered and its unreasonable attitude towards preventing the court from reviewing its legislation was observed. Prior to 1994, parliament could enact any kind of legislation and the court could not review the same if it was enacted in a procedurally correct manner. The coming into operation of the Constitution saw the right to remain silent, privilege against self incrimination and the right to a fair trial being made constitutional rights. A strict

[319] De Villiers *Evidence* 910.
[320] *S v Coetzee* (1997) 3 SA 527 (CC) para 168.

liability offence has to be measured against the Constitution to establish whether it is an instrument that could still be treasured under the new Constitution to enforce the law.

Presumption of innocence has been proven to be seriously offended by strict liability. The presumption of innocence promotes the notion that the state is supposed to prove the quilt of the accused beyond reasonable doubt. As indicated earlier, by guilt the reference is made to the guilty mind. However, strict liability does not care about the status of the mind of the person who is committing the offence. According to these offences, proof of the *actus reus* beyond reasonable doubt by the state is sufficient to secure a conviction. This is based on this notion that this study is of the view that strict liability infringes the presumption of innocence.

Strict liability in the same instance creates what is called reverse onus and when it does that it also affects the accused's right to remain silent. In one instance the accused is expected to furnish evidence indicating that he was not at fault only in instances where statutes make a provision for a specific defence. The right to remain silent is not available for the accused as he is expected to prove the defence of due diligence as expected by the legislature. On the other hand the legislature dispenses completely with the element of fault which renders the right to remain silent useless whether it is waived or not.

The manner in which the offence is formulated makes it useless to claim the right because the conviction will follow even if you did submit your defence, provided the state succeeded in proving *actus reus.* It is hard to maintain that the right to a fair trial exists under the strict liability offence, as it is only under rare circumstances that the legislature explicitly indicates a defence that can be raised in statutes that create strict liability. More often than not the legislature creates legislation that excludes fault completely; a prosecution is merely expected to prove *actus reus* and the conviction will be secured. Any explanation that the accused can offer will not have any influence on the end result irrespective of whether the court believes it or not.

The right to a fair trial cannot be said to be promoted where the accused is charged with a strict liability offence. This study shares the sentiments of Wight where he indicates that some cases have been decided where he felt that the conviction was

both unfair and unjust.[321] He approvingly refers to two cases, that is, *R v Storckwain* and *R v Larnsonner.*[322] In *Storckwain* the pharmacist was convicted for supplying drugs to someone who had a forged doctor's prescription. In this case, the court did not consider that he was not an expert in identifying forged documents; hence, it cannot be said under those circumstances that the accused received a fair trial.

In *Storckwain* the pharmacist was convicted from the outset because he did not deny that he had willingly provided the said drugs to the patient. His defence was that he was provided with a forged prescription and that he had not realised it. The state was only required to prove *actus reus,* which the accused admitted, which made going through the trial a procedural matter. The same goes for *Larsonner* who was convicted in the UK for being in contravention of Aliens Act 1920, an offence which was deemed by statute to be of strict liability. The accused was forced to leave England for her passport prevented her from working in the UK. After leaving the UK, she went to Ireland but was caught and deported back to England. The court convicted her despite the evidence that she had not come back to England willingly. These two cases show how people are being ambushed in the name of strict liability offences.

Wight opines that:

> Both of these cases show that, when a statute has created an offence of strict liability, not all of the possibilities of circumstances have always been thought through properly. This has been shown however when some convictions where the offence has been deemed to be one of the strict liability has been quashed at a later date by the House of Lords where they have realised that it would be unjust for these convictions. These cases include and (*Sweet v Parsley* 91969) and *B (a minor) v DPP* (2000).[323]

Strict liability offences are said to be public welfare offences. Their purpose is to protect the wellbeing of the public. This study will submit that it is unjust to strip a person of the rights enshrined in section 35 of the Constitution for the good of the public. The argument for strict liability is that it helps the prosecution to prove cases where it would be difficult to prove the element of fault on the part of the state. Civil Liberties Australia (CLA) raised a valid argument when it held that:-

> It is true that often the legal burden is set quite high and can be difficult and demanding for government department to meet. But that is as it should be. Our legal system is based on the time honoured principle that it is better to

[321] Wight 2010 http://www.peterjepson.com/law/A2-2%20Jonathan%Wight.htm (10 September 2010).
[322] *R v Storckwain*[1986] 1 WLR 903 [HL] *R v Larsonneur* (1933) 24 Cri. Appl .Rep.74.
[323] Wight 2010 http://www.peterjepson.com/law/A2-2%20Jonathan%Wight.htm (10 September 2010).

> let guilty men go free if that is what it takes to protect the innocent from wrongful conviction and underserved punishment. For this reason government departments should not seek to lower the burden to succeed in prosecutions through such devises as strict and absolute liability offences.[324]

This is a well-structured argument that was put together for the purpose of exposing the ruthless and unjust effects attached to the application of strict liability offences. The study supports this argument wholeheartedly. Strict liability promotes the conviction of the innocent and such a principle cannot be said to pass the constitutional muster.

5.9.1 O'REGAN J's ATTITUDE

O'Regan J in *S v Coetzee* displayed a hostile attitude towards strict liability offences. She even quoted with approval from the case of *United States v US Gypsum Co 478 US 422 (1977)* which showed a resistance towards accepting that statutory offences that dispense with the requirement of culpability without clear intention from the statute. In the same *S v Coetzee* matter, she further quoted from the report on the penal system of the Republic of South Africa (1976) of paragraph 5.1.2.82. The report held that: -

> In spite of the recognition in certain legal systems of the so called strict liability offences, this commission remains impenitent and adamant in expressing the view that strict liability offences cannot be justified in the criminal law. If the "offender" unwittingly commits an act circumstances which totally absolve him from any blame, what is the object in punishing or even penalising him? There would, in the commission's view, be no sense in doing so.[325]

This objection by the Viljoen Commission was brought in 1976 long before the supreme Constitution was introduced. Yet it is still difficult to completely extinguish the existence of this sorry type of offence. O'Regan J also supports the view that fault must always form part of criminal offence. The judge held that: -

> The striking degree of correspondence between legal systems in relation to an element of fault in order to establish a criminal liability reflects a fundamental principle of democratic societies; as a general rule people who are not at fault should not be deprived of their freedom by mistake. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally on negligently, the state may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule, where culpability is established, and the conduct is legitimately deemed unlawful, then no such breach arises.[326]

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[324] Standing Committee Report 7 2008 24.
[325] *S v Coetzee* (1997) 3 SA 527 (CC) para 164.
[326] *S v Coetzee* (1997) 3 SA 527 (CC) para 176.

The sentiments expressed by O'Regan J are shared by this study. Strict liability is required to be specifically decided by the Constitutional Court in order to remove the uncertainties surrounding the application of it in South Africa. Although strict liability encountered resistance from the beginning, no court was brave enough to declare it invalid. This situation might have been different before the Constitution because of the limited powers that the court had to review the legislation. However, at this stage the court derives the powers to review legislation from the Constitution and it even empowers the courts to declare any law or conduct that is in conflict with it invalid. The time has come for the Constitutional Court to provide us with the much anticipated guidance for approaching strict liability offences.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 CONCLUSION

Concern has been raised in some quarters about the harshness and injustice promoted by the strict liability offences. This study undertook to investigate this type of offence with in the hope of discovering an amicable solution. The study is based on two opposing views. One view is of the protection of the public and the other is on the accused's fundamental rights which are threatened by the practice of this doctrine or principle of strict liability. It is of utmost importance when dealing with this part of the study not to lose sight of the aim that the study is seeking to achieve.

The sentiment of this study generally is that strict liability should not be accommodated in a modern, civilised and democratic society. It was not a difficult task to access the information that advanced the argument against the existence of strict liability offences as was clearly indicated by the vehement opposition to this doctrine by the majority of legal practitioners and academics. Even the courts are reluctant to apply this doctrine in practice; nevertheless it continues to triumph over the opposition.

This study recognises and acknowledges the existence of the Constitution which empowers the Constitutional Court to act harshly towards any conduct or law which is inconsistent with the provisions of the Constitution.[327] The Constitutional Court, despite the powers vested in it by the Constitution to resolve any constitutional dispute, has been disturbingly quiet even though it has been in operation for more than sixteen years. Moreover, any court on the level of the High Court and the Supreme Court of Appeal can make a finding on the constitutionality of any law or conduct. The finding must, however, be confirmed by the Constitutional Court.

It is the aim of this study to see necessary constitutional pronouncements being made to avoid the uncertainties surrounding the application of this principle of strict liability. This research attempted to explore the historical foundation of this doctrine with a view to uncovering the idea behind the legislature taking the drastic measure of punishing the blameless in the name of protecting public safety and dealing with issues of social concern. It is important to highlight at this point that the effect of introducing strict liability as part of any offence is that the state will not be expected to prove *mens rea*.

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[327] 1996 Constitution.

The state will not be expected to prove that a person had a guilty mind when committing the offence for as long as *actus reus* is proved beyond reasonable doubt. In this regard it is maintained that this totally ignores the *mens rea* of the accused during the commission of the offence for as long as *actus rea* is proved to the court's satisfaction. The exclusion of the element of *mens rea* is the cause of all the controversy surrounding the doctrine, considering the crucial nature that *mens rea* plays in our criminal justice system. Milton and Fuller take pleasure in explaining that no principle of criminal law is more firmly established than that which proclaims that *mens rea* is an element of all common law crimes.[328]

Generally speaking, strict liability offences are created by statute. It is for this reason that Milton states in opposition to the promotion of strict liability offences that there is no reason why the same consideration of equity and justice which ordains that *mens rea* should be an element of a common law should not also apply in the case of statutory crimes.[329] The main opposition is based on the effect of violating the constitutional rights of the accused to be presumed innocent, the right to remain silent, the right to a fair trial and the privilege against self incrimination. These rights together with the elements of the offences are the most important ingredients of a just and fair criminal justice system.

The other integral part of any criminal justice system is sentence. This is the stage where the accused will be punished in accordance with the degree of his blameworthy state of mind. The sentence of a convicted criminal is based on theories of punishment as a guiding tool. Strict liability offences go against the most important principles of criminal law which justify the existence of criminal law as an aspect of the law. It is pivotal to note here that theories of punishment are said to be a justification for punishing the accused. This study shared the view of Snyman that strict liability offences disregard and displace the theories of punishment which are accepted to be justifying the punishment of an offender.[330]

The study went further to look into another shared view between itself and Snyman that uncertainty exists about the constitutionality of strict liability.[331] The Constitutional Court at this stage has not made any pronunciation on the constitutionality of this doctrine. However, the decision of *S v Coetzee* gave us

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[328] Milton and Fuller *Criminal Law and Procedure* 23.
[329] Burchell *Criminal Law* 2.
[330] Snyman *Criminal Law* 247.
[331] Snyman *Criminal Law* 243.

insight into the feelings of the Constitutional Court towards strict liability.[332] This matter provided the faction that opposes the application of strict liability with valuable guidance on how to challenge the doctrine later on. With the backing and permission of the Constitution, this study explored legal systems from various countries in terms of this subject.

The purpose for such a move was to gain an insight into ways in which other countries handle the doctrine and to probably find a principle that will help us to develop our principle to comply with constitutional expectations and further alleviate the harshness. This study was alive to the possibility that it might appear that the doctrine is better kept in its current form. An interesting question that arises here is whether the doctrine of strict liability is not misplaced in the criminal justice system. Is it possible that the doctrine could have been better placed under civil law?

A conclusion signals the end of whatever project one is busy with; for this project it means the end of the journey of reading, and gathering and writing down information concerning this controversial aspect of our law.

Chapter 2 dealt mainly with the origin of this principle and the reason for its development. It was said that strict liability offences were created to help punish mostly business-related offences and they originated from English common law. The legislature took a controversial decision when creating this principle, and it has met with vigorous opposition all over the world.

As indicated earlier, what raises a concern in this matter is the fact that strict liability unreasonably relieves the prosecution of the duty of proving the most integral element of the offence *mens rea* or guilty mind. The law is literally punishing a person who is blameless or innocent. Even the academics are against the doctrine of strict liability. An anonymous writer states that:

> The imposition of strict liability in the criminal law is widely thought by academics to be unjustified. There is, moreover, a broad consensus about why it is wrong. Strict liability leads to conviction of persons who are, morally speaking, innocent. Convicting and punishing those is a misuse of the criminal law an institution which, because of its grave implications for the lives of convicted defendants, should be reserved only for the regulation of serious wrongs done by culpable wrongdoers.[333]

[332] *S v Coetzee* (1997) 3 SA 527 (CC).
[333] *Anon* 2010 http://www.law.upenn.edu/academics/institutes/ilp/200304papers/simesterpaper.pdf (23 October 2010).

The concern of this study was about the relationship between strict liability and sentence, and about the contravention of the fundamental principle of human rights by the doctrine of holding a person criminally liable despite the absence of *mens rea.* This is a serious violation of natural principle of fairness and justice. Davis explains when the doctrine of criminal liability is believed to be fair in a clear and understandable manner, and it subsequently transpires that the doctrine of strict liability falls outside the definition. He states that criminal liability only arises when it is for an intentional act that illegitimately poses a thread with which the law has concerned itself.[334]

A negative attitude towards the concept of strict liability by international law became apparent when the application of this principle by other countries was explored in Chapter 3. It is commonly understood that the effects of strict liability relieve the prosecution of the duty to prove an element of *mens rea* in a case where a strict liability offence has been committed. The Constitution also empowers our courts when interpreting and developing common law to consider both foreign and international law. This study was also influenced by the Constitution to investigate the approach of the principle by international community and derived some principles which played a major role in formulating recommendations.

Chapter 4's contribution was in terms of the fairness of sentencing a person who has committed a strict liability offence. The study was as appalled by this notion of punishing the blameless as Davis was when he states that:-

> The problem posed by strict liability in the criminal law, then, is that of explaining how the objective of strict liability statutes can justify any punishment at all or, in other words, how there can justly be a crime without even the low-grade evil mind of negligence.[335]

It is the submission of this research that the argument put forward indicates that normal principles of sentencing cannot be applied under these offences. This study is not convinced that there is any valid argument that can be advanced to support or justify an imposition of a sentence under these circumstances. It has been argued again that imposing a strict liability helps to deter the accused and would-be offenders from committing the offence. This study is of the opinion that deterrence cannot be effective where a person has a valid reason for contravening the law, or

[334] Davis 33 *Wayne L. Rev.* 1369.
[335] Davis 33 *Wayne L. Rev* 1373.

even where a person has taken all reasonable steps to avoid the commission of the offence.

Punishment under those circumstances will not have the necessary and intended effect of deterring the accused and would-be offenders. De Groff not only supports the view of ineffectiveness of punishment as deterrence for strict liability, but also indicates that its use might weaken the criminal law's effect by diluting the sense of social condemnation traditionally associated with criminal guilt.[336] He highlights the significance of holding on to and promoting the unique sense of moral blameworthiness of criminal law. The reason for holding that view is that if such a sense can be lost the force behind criminal sanctions might largely be destroyed.[337]

De Groff quotes with approval La Fave, who was also opposed to the imposition of sentence for strict liability offences as he labelled it as unfair and ineffective as a deterrent. La Fave stated that:-

> The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who need to be subjected to the stigma of a criminal conviction without being morally blameworthy.[338]

Not only De Groff was opposed to the punishment under strict liability, even Erlinder shared the view. He indicates that a criminal sanction without blameworthiness has little support in either deterrent or retributive theory.[339] The purpose of this chapter is not to rewrite the chapters already written but to highlight important views that might be of assistance in formulating a conclusion and ultimately outlining some recommendations of this study. The leading case of *Lim Chin Aik* which was decided in Singapore also set down a good guiding principle.[340]

The practice in Singapore was that the decision to impose strict liability must not be done haphazardly but after a careful consideration of the positive influence that will be yielded by the decision. The court reiterated that the imposition of strict liability must be supported where it would assist in the enforcement of the regulations. Arguments from a sentence perspective do not support a sentencing of a strict

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[336] De Groff 2004 *Loy.Law.Rev* 845.
[337] De Groff 2004 *Loy.Law.Rev* 845.
[338] De Groff 2004 *Loy.Law.Rev* 845.
[339] Erlinder 1981 *Am.J.Crim.I.* 169.
[340] *Lim Chin Aik v R* [1963] AC 160 (PC) 174.

liability offender and the opposition to the sentence of a person convicted of strict liability comes from as far back as the doctrine's inception.

In 1976, the Viljoen Commission compiled a report critical of the practice of the doctrine of strict liability. The content of this report, as referred to by O'Regan J in *S v Coetzee,* who also vehemently opposed strict liability offences, stated that:-

> In spite of the recognition in certain legal systems of the so called strict liability offences, this commission remains impediment and adamant in expressing the view that strict liability offences cannot be justified in the criminal law. If the "offender" unwittingly commits an act which totally absolve him from any blame, what is the object in punishing or even penalising him? There would in the commission's view no sense in doing so.[341]

Another issue that needed to be interrogated was the constitutionality of strict liability offences as dealt with in chapter 5. The provisions of section 35(3)(h) of the Constitution were raised as rights that are being violated by the offence of strict liability.[342] The said rights are the right to remain silent, the right to a fair trial, the presumption of innocence and privilege against self incrimination. In *S v Coetzee* Sachs J held that:-

> ... the presumption of innocence, ... serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.[343]

If it appears in a case of strict liability offences that the accused willingly committed a prohibited act, he will inevitably be convicted irrespective of whatever version he puts forward. In a criminal case, the right to remain silent means that the accused should be presumed innocent until proven guilty by a court of law; accordingly, he is not expected to waive his right and bring evidence to rebut an element that was never proven by the prosecution. If the accused at the beginning of a trial admitted to having willingly committed the prohibited act, in terms of strict liability he is to be found guilty; consequently, going through the trial will be a formality as the elements of the offence would have been satisfied.

It is not only the presumption of innocence that is at issue as far as the constitutional principles violated by strict liability are concerned. This study revealed that even the right to remain silent and privilege against self incrimination were found to be violated by this doctrine. This study perceives these rights to be crucial and their

[341] *S v Coetzee* (1997) 3 SA 527 (CC) para 164.
[342] 1996 Constitution.
[343] *S v Coetzee* (1997) 3 SA 527 (CC) para [220].

violation is unjustifiable. This view was shared by Levinson J in *S v Shangase* as referred to by Davis when he said:-

> Levingson J noted that the fundamental rights contained in section 25(2)(a), 525(3)(c) and section 25(3)(d), which embody the presumption of innocence and the right to remain silent, are the very pillars of a criminal justice system in an open and democratic society.[344]

The provision of section 25 that Levinson J was referring to is the equivalent of section 35 of the final Constitution. The classification of these rights by the Judge as being the very pillars of a criminal justice system indicates just how much weight the courts places on these rights. However, as outlined earlier, not all legal systems regard the doctrine of strict liability as contravening the accused's rights. There are some instances where the defence of due diligence or mistake of fact is created by the empowering legislation. In other words the statute creates what is called reverse onus.

The creation of such reverse onus was said by O'Regan J in *S v Coetzee* to be contravening the right of the accused to remain silent.[345] However, a different view was held by Cory J in the Canadian decision of *R v Wholesale Travel Group* when stating that:-

> Strict liability offences, as exemplified in this case by the combination of S.36(1)(a) and S.37.3(2)(a) and (b) of the Competition Act, do not infringe either S.7 or 5.11(d) of the charter. Neither the absence of a *mens rea* requirement nor the imposition of an onus on the accused to establish due diligence on a balance of probabilities offends the charter rights of those accused of regulatory offences.[346]

The statement by Cory J insinuates that this is acceptable and it is indeed so that the abovementioned sections are infringed on when an offence is one of common law. Such classification cannot therefore be accepted and/or promoted. A criminal offence will remain a criminal offence and must be treated in terms of the criminal law principles irrespective how it was created. The consequences of both regulatory and common law offences are the same; it is the conviction and sentence. That does not make sense why strict liability offences which are regulatory offences should be subjected to different and prejudicial principles to the accused? It is important at this stage to give an insight of section 7 and 11(d) of the charter that Cory J in *R v Wholesale* travel was referring to. The charter held that:-

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[344] Davis et al *Fundamental rights* 180.
[345] *S v Coetzee* (1997) 3 SA 527 CC.
[346] *R. v. Wholesale Travel Group Inc.* [1991]. 154 217.

> Life, liberty and security of person
> 7. Everyone has the right to *life*, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
> Proceedings in criminal and penal matters
> 11. Any person charged with an offence has the right
> ...
>
> *(d)* to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;[347]

Section 34 promotes the right of a person to have access to the court. It states that everyone has a right to have a dispute that can be resolved by an application of the law to be so resolved by a court or independent and impartial tribunal.[348] There is what appears to be a valid argument that criminal offences do not enjoy the benefit of this section, as criminal offences are not classified as disputes in terms of the interpretation. This view is rejected by this study. The complainant in a criminal case who alleges that the accused committed an offence against him and the accused who denies such allegations both have the right to have that dispute resolved by a court of law.

The accused's right to have access to the courts is infringed by offences that do not allow him a fighting chance in court. The section 36 limitation clause outlines the grounds on which rights can be legitimately limited. It is the submission by this study that, unfortunately, the rights in issue here are those that do not deserve to be compromised. The fault element is regarded as one of the most important elements of criminal law; accordingly, there is a common belief across all the legal systems that there can be no liability without fault. O'Regan J was in *ad idem* with this view in *S v Coetzee* when it was held that:

> The striking degree of correspondence between legal systems in relation to an element of fault in order to establish a criminal liability reflects a fundamental principle of democratic societies; as a general rule people who are not at fault should not be deprived of their freedom by mistake.[349]

It is unfortunate that such an offence that was created with good intentions had to endure such criticisms from the courts, practitioners and society at large. In 1987, Richardson stated that:

> Strict liability, it is claimed, provides improper basis for the imposition of criminal sanctions since it can lead to the punishment of the "faultless".

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[347] Canadian Charter of Rights and Freedoms PART I OF THE CONSTITUTION ACT, 1982.
[348] 1996 Constitution.
[349] *S v Coetzee* (1997) 3 SA 527 (CC) para 176.

> Such an outcome is said to be both unacceptable of itself and damaging to the criminal law.[350]

In *S v Qumbela* Holmes JA emphasised that the basic principle of criminal law is that *actus non facit reum nisi mens sit rea* (an act does not make a person guilty of his crime unless the mind be also ready).[351] Holmes JA reflected that the legislature has the powers to create strict liability offences and to override the fundamental principle of fairness, which would render innocent violations punishable.[352] The Viljoen Commission, in its report on the penal system of the Republic of South Africa in 1976, indicated that strict liability cannot be justified in criminal law.[353] It further stated that it does not make sense to punish a blameless person. An English law decision of *Sweet v Parsley* showed reluctance in applying strict liability where the Parliament did not specifically say it must be applied.[354]

Singer stated that:-

> Strict criminal liability is dissonant with the basic premise of criminal liability-that only a morally blameworthy defendant should be stigmatized, much less imprisonment. That premise has sustained us through many centuries. Only in the nineteenth century did that view begin to alter, as objectivization of the criminal law took on the aegis of utilitarianism and legal positivism. Even then, however, both courts and legislatures were slow to adopt the view that the criminal law could, or should, reflect society's growing concerns with serious problems raised by individualisation. The first fifty years of strict criminal liability, both in this country and in England, were extremely tentative, and were not powered by the engine of these concerns. Only in the twentieth century, as those concerns grew, did the courts embrace, even partially, the premise of strict liability. Even then, the repugnance for imposing criminal sanctions for what were essentially non-criminal acts led the courts of the Commonwealth to adopt a "halfway house" of negligence, and led the Model Penal Code in this country to jettison entirely the notion of strict liability criminality. Those instincts are correct. Recent developments, both here and in other countries in which the common law has informed the law's growth, have demonstrated that there is a continuing resistance to strict criminal liability, and that we may soon find that the criminal law has been restored to its primary, indeed its only, focus-imposing social stigma on those who knowingly, purposely, or recklessly act in disregard to social and moral duties, unless blameworthiness is to be repudiated as the predicate for criminal liability, this trend should be encouraged, and the "subjectivist bug" allowed to regain its rightful position in the criminal law.[355]

The Singapore decision of *Lim Chin Aik* indicated that it did not support a punishment that is futile.[356] It also held that it must be inquired as to whether putting

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[350] Richardson 1987 CLR 295.
[351] *S v Qumbela* 1966 (4) SA 356 (A) at 364.
[352] *S v Qumbela* 1966 (4) SA 356 (A) at 364.
[353] *S v Coetzee* (1997) 3 SA 527 para 16.
[354] *Sweet v Parsley* [1969] UKHL 1 (23 January 1969) at para 2.
[355] Singer 30 *B.L.Rev.* 337-410 (1988-1989) 407-408.
[356] *Lim Chin Aik v R* [1963] AC 160 (PC) 174-175.

the defendant under strict liability will assist in the enforcement of the regulations.[357] The reference to arguments opposing strict liability can take forever. In the recent decision of *S v Coetzee,* O'Regan J expressed her disapproval of strict liability offences and the reverse onus that is sometimes created by it.[358] It is tempting for this study to conclude by saying that the doctrine of strict liability must be declared invalid by the Constitutional Court based on the evidence of its harshness put together by this study.

It has, however, proved to be futile to do so based on the vehement opposition faced by this doctrine and it is still standing to date. Even renowned writers like Snyman are of the opinion that strict liability will not survive the constitutional muster.[359] On the other hand, those who support its existence say it is for the protection of the public. The best option is to find a way to develop this doctrine to best suit both circumstances. We still hope that the Constitutional Court will make a proper pronunciation on the constitutionality of these offences. Moreover, it is the belief of this study that by enacting legislation that imposes strict liability the legislature is using criminal process to achieve the civil litigation goal.

In conclusion, as De Groff rightly states:

> By operating under a misguided belief that fear necessarily promotes compliance, legislatures, prosecutors, and court risk disproportionately penalizing individuals who comply with the regulations in good faith, but are nonetheless victims of accident or mistake. For those who attempt to comply with the law in good faith, the thread of strict liability is unlikely to elicit improved performance, as one commentator has observed, "[w]hatever value strict liability may have against those with the ability to prevent harm, there is no utility when all reasonable means and care have been taken and the activities are commonly accepted as necessary to modern society".[360]

6.2 RECOMMENDATIONS

It can never be said that strict liability offences do not infringe on the rights of the accused, as discussed in chapter 5, that is, the right to remain silent, the right to a fair trial, presumption of innocence and privilege against self incrimination. As Wight's article states, the imposition of strict liability in certain criminal offences is a

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[357] *Lim Chin Aik v R* [1963] AC 160 (PC) 174-175.
[358] *S v Coetzee* (1997) 3 SA 527 (CC).
[359] Snyman *Criminal Law* 243.
[360] De Groff 2004 *Loy.L.Rev* 845.

necessary evil in the fight to protect the public from harm.[361] Hence, the recommendations made by this study are as follows:

1. At the moment the courts are at liberty to interpret the legislation and, accordingly, decide that an offence is a strict liability. Such liberty should be curtailed by requiring the legislature to be specific when creating a strict liability offence.
2. It should be the duty of the prosecution to prove that the offence falls under the category of public welfare offences.
3. The empowering legislation should follow the Australian and Canadian approach by specifically making a provision for defence of due diligence or mistake of fact or any other defence that may be found to be reasonable.
4. The court should consider the issue of whether punishing the accused will serve any purpose. Reference should be made to the approach followed by Singapore in this aspect.

The approach of Singapore is in *ad idem* with proposition number 5 of Lord Scarman in the Hong Kong decision of *Gammon,* where it was stated that even where a statute is concerned with an issue of social concern and public safety, the presumption of *mens rea* stands unless it can be shown that the creation of strict liability will be effective in promoting the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.[362]

[361]Wight 2010 http://www.peterjepson.com/law/A2-2%20Jonathan%Wight.htm (10 September 2010).
[362] *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1984] 2 All ER 503 at 508.

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