DEFENCES TO STRICT LIABILITY OFFENCES IN SINGAPORE AND MALAYSIA

THE proliferation of statutory crimes is inevitable in Singapore and Malaysia given the bustling economic and industrial activity that goes on within these states [1] and the many social problems that arise from rapid economic development within their communities.[2] The growth of statutory offences is a phenomenon not unique in this region. A Canadian study in 1974 found that the federal laws contained about 30,000 regulatory offences and that the laws of each province averaged about another 30.000.[3] Legislation throughout the Commonwealth, respond to new social pressures by creating offences by statutes or regulations. The large majority of these provisions define the offence created by reference only to the prohibited act thus giving rise to the possibility that a conviction of an offender may be secured upon the mere proof of the commission of the prohibited act.

An old justification for the creation of statutory offences without reference to the mental element involved in the offence is that these offences are really not criminal in nature, that they deal with minor infractions in the area of traffic, sale of food and the like, that no moral stigma are attached, and that they usually involve fines of small amounts. That justification, which has been advanced in recent decisions,[4] does not hold good as far as many statutory offences in Singapore and Malaysia are concerned. Severe penalties may flow from the violation of acts prohibited by statutes. A new phenomenon in Singapore is the imposition of mandatory minimum sentences for strict liability offences. The Arms Offences Act, 1984 imposes a mandatory minimum sentence of five years for unlawful possession of firearms. In Malaysia, a discretion exists in the prosecutor to treat the same offence as an offence which falls under the Internal Security Act.[5] The penalty for such an offence may be death. It is unrealistic to confine strict liability offences to a dark corner of the criminal law by referring to them as a species of "administrative offences" which "are not criminal in any real sense"[6] when the penalties involved for

1 The growth of economic crimes in this region is dealt with in M. Cheang, "Economic Crimes: An Overview" [1984] 2 M.L.J. xlii.

2 To buttress the point, the Straits Times, 7th October, 1984 contained references to statutory offences created in relation to the operation of cranes at building sites and to amendments to the Companies Act imposing criminal sanctions on directors of companies which had failed from assuming directorships of new companies for a specified period of time. The control of drugs and firearms is an area in which there will be greater legislative activity.

3 The Law Reform Commission of Canada, *Studies on Strict Liability* (1974) p. 9. The Report noted that "the problem quantitatively speaking is enormous".

4 E.g. Dickson J. in *R.* v. *City of Sault Ste Marie* (1978) 40 C.C.C. (2d) 353 at p. 357, but see p. 364.

5 See *Lau Kee Ho* [1984] 1 M.L.J. 110.

6 *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918; in *Sweet* v. *Parsley* [1970] A.C. 132, Lord Reid distinguished between "quasi-criminal offences" and offences carrying "the disgrace of criminality". Also *Alphacell* v. *Woodward* [1972] A.C. 824 where the offence was treated as not "criminal in any real sense".

these violations are so severe. This is so throughout the Commonwealth where increased fines and imprisonment are common sanctions for strict liability offences. An illustration is provided by the recent Singapore legislation, Water Pollution Control and Drainage (Amendment) Act, 1983 which provides for a penalty of $10,000 or a penalty of six months imprisonment or both for the first offence and a minimum of one month imprisonment and a fine of a minimum of $20,000 for each subsequent offence. It is interesting to note that similar penalties for pollution are required by statutes in other Commonwealth jurisdictions.[7] It is likely that legislatures and draftsmen in the Commonwealth will imitate each other and deal with common problems in a like manner. Strict liability offences deserve a greater attention than they have received so far.[8]

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

Yet, the liberal argument that the innocent should not be punished in order to achieve social goals is based on an abiding principle of justice and continues to exert a powerful restraining influence on the use of strict responsibility. It is the existence of this principle which makes judges vacillate at the brink of the imposition of strict responsibility and ensure that the statute creating the offence is read in such a manner that, while social objectives behind it are furthered, no real injustice is done to the accused. It is in the course of resiling from the brink of strict responsibility that the judges have adverted to the existence of defences to strict liability offences. This trend can be seen in many judgments of the courts of Singapore and Malaysia and a task of this paper is to isolate these trends and give them some substance by providing them with a theoretical and comparative framework so that the trends could be further developed and strengthened.

The existence of these defences may indicate a way of reconciling two seemingly inconsistent interests involved in the area of strict liability. The interests of securing the objective of preventing the social harm against which the statute is directed is furthered by the imposition

[7] E.g. The Ontario Water Resources Act, 1970.

[8] The last article on Malaysian and Singapore law on this area was written in 1967. B. McKillop, "Strict Liability Offences in Singapore and Malaysia" (1967) 9 Malaya L.R. 118. The most recent book on this area is L.H. Leigh, *Strict and Vicarious Liability* (1983). The other books on it are J.L1.J. Edwards, *Mens Rea in Statutory Offences* (1958); C. Howard, *Strict Responsibility* (1962).

of strict liability. The interest of the individual requires that he should not be punished unless he entertained a blameworthy state of mind. The judicial awareness of the conflict is demonstrated by the following dictum of Dickson J. of the Canadian Supreme Court:[9]

> Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand there is a generally held revulsion against punishment of the morally innocent.

This paper involves a comparative study of the defences to strict liability in Singapore, Malaysia and the Commonwealth. It begins by exploring the relationship of strict liability offences to the general exceptions to criminal liability stated in the Singapore and Malaysia Penal Codes. It, then, demonstrates that in this area, the Penal Code and its principles have been discarded by the local courts and that they prefer to obtain guidance from English precedents. The conclusion is advanced that this situation necessarily means that there is a dual track system of criminal law in Singapore and Malaysia, one based on the Penal Code and the other on statutory offences, the interpretation of which are guided by the precedents of English and other Commonwealth courts. The paper demonstrates that the vitality of the English precedents is greater under the second track. It then discusses the bases on which strict liability has been derived from statutes by a process of judicial interpretation. A statement of these bases is necessary as some of the suggested defences draw their support from them. Finally, the paper surveys the defences to statutory offences of strict liability for which there is authority in the law of Singapore and Malaysia.

I. Strict Liability and the Penal Code

Theoretically, the Penal Codes of Singapore and Malaysia contain exhaustive statements of the criminal law of these states. This is so in the case of India from where the Penal Code was borrowed. Unlike some other Commonwealth codes,[10] there is no *casus omisus* provision which enables a judge to look to English law where any principle has been left unstated in the code. The absence of such a provision was deliberate. The Penal Codes of India, Ceylon, Singapore and Malaysia were intended to be complete codes[11] and no reference was to be made to English law in their interpretation, despite the fact that they were "nothing but a codification of English law shorn of its technicalities".[12] The structure of the criminal law in these countries was that the Penal Code would provide the base of defining the general principles of the criminal law and the common law crimes. The Penal Code, itself being a piece of legislation, could be altered by the legislature and new crimes could be added by later legislation. Where new crimes were so added, the need to restate the application of the general principles to the new crime was avoided for the Penal Code mandated the application of these principles to the new crime. S. 6 of the Penal Codes of Singapore and Malaysia requires that general exceptions

9 In *R.* v. *City of Sault Ste. Marie* (1978) 40 C.C.C. (2d) 353 at p. 363.
10 E.g. S. 8 of the Tasmanian Criminal Code.
11 M.C. Setalvad, *The Common Law in India* (Hamlyn Lecture Series).
12 Sir J.F. Stephen, *The History of the English Criminal Law,* Vol. 3.

contained in Chapter IV of the Penal Codes be applied to all offences under the Penal Code. Hence all offences under the Code as well as new offences created by amendments to the Code are subject to the defences to liability stated in Chapter IV. Hence, Thomson C.J. was clearly in error when, in *Mohamed Ibrahim,*[13] he construed s. 292(a) which makes it an offence to sell or exhibit obscene literature, as creating an offence of strict liability. As much as there is no scope for strict liability within the Penal Code itself, there is no scope for strict liability within a system of criminal law controlled by the Penal Code, unless the legislature manifests a clear intention to move the offence it creates outside the structure of the criminal law controlled by the Code. This is clear from s. 40(2). S. 40(2) states that the defences under Chapter IV are available in respect of offences under the Penal Code and are equally applicable to offences created "by any other law for the time being in force". As a matter of statutory construction, it is clear that an offence of strict liability cannot be created under the Penal Codes, except by expressly excluding the application of Chapter IV, which contains the defences based on the absence of *mens rea,* to the offence.

This statutory construction was adopted in Ceylon in the case of *Perera* v. *Munaweera.*[14] The case concerned a baker who had sold a loaf of bread weighing 15¼ ounces at a price fixed for a 16 ounce loaf. The accused stated that he believed that the loaf in fact weighed 16 ounces. The defence raised was one of mistake of fact and the question at issue was whether the section of the Act which made no reference at all to *mens rea* permitted a plea of mistake of fact as a defence to liability. Authority in Ceylon up to that point had been divided. One line of cases relied on English precedents and held that, despite the existence of s. 38 (which was the section in the Ceylon Code corresponding to *s.* 40(2) of the Singapore and Malaysian Codes), statutory offences could be construed as involving strict liability. Representative of this line of authority was the judgment of Sir Francis Soertsz in *Perumal* v. *Arumugam.*[15] He said in that case:

> Section 38 makes section 72 (which deals with mistake of fact) applicable to offences punishable under 'any law other than this code' but, in my opinion, this does not mean that it necessarily applies to all offences outside the Penal Code. It is not an inflexible rule. Whether it applies or not must... depend on the particular legislative enactment. There are many branches of social and municipal legislation in which the act is made criminal without any *mens rea.*

This line of cases clearly regarded strict liability offences as forming a category of offences falling outside the scope of the Penal Code and relied heavily on contemporary English precedents for guidance. The other line of cases favoured the view that defences to liability stated

[13] [1973] M.L.J. 289; but see *Sim Poh Hoh* [1966] 1 M.L.J. 275. Also see McKillop who has observed that "there is really no scope for strict liability offences under the Penal Code"; *op.cit.* (1967) 9 Malaya L.R. 118 at p. 123. This was accepted in early cases — *Abdulla* [1954] M.L.J. 195; *Lim Ah Tong* [1948-49] M.L.J. Supp. 158; *Arumugam* [1947] M.L.J. 45; *Chin Kiang Yin* [1956] M.L.J. 217 and there is the authority of the Privy Council in *Subramaniam* [1956] M.L.J. 220 which support it. But these cases have generally been overlooked in later law.

[14] (1955) 56 N.L.R. 433.

[15] (1939) 40 N.L.R. 532.

in Chapter IV applied to all statutory offences unless specifically excluded.[16] Faced with these conflicting decisions, the Chief Justice, Sir Alan Rose (who was later to become Chief Justice of Singapore) referred the question raised in *Perera* v. *Munaweera* to a bench of five judges. Among the judges was Gratien J. who was later to be the counsel in the leading Singapore decision on strict liability, *Lim Chin Aik*.[17] The Court observed:

> S. 38(2) of the Code unambiguously declares that the word "offence" in Chapter IV of the Code (dealing with General Exceptions) "includes a thing punishable in Ceylon under any law other than this Code". Accordingly s. 72 applies to every statutory offence even if it does not contain a particular state of mind or knowledge as to one of its elements.

As a result of *Perera* v. *Munaweera*, a strict liability offence can be created in Ceylon only by the express exclusion of the defences based on *mens rea*. Events in Singapore and Malaysia have precluded the reaching of such a solution though the Codes in these countries contain the same provisions. The adoption of the view in *Perera* v. *Munaweera* would have given effect to the Canadian Law Reform Commission's recommendation that "whether or not strict liability should have any place in the criminal law, the law must be clarified to make it plain whether any given offence is one of strict liability".[18] The statute creating strict liability would have made this plain, for it would have contained an exclusion of the defences based on *mens rea*. The onus would have been on the legislature to indicate clearly whether or not the offence was one of strict liability. The criticism that judges were playing a legislative role by construing certain statutory offences as involving strict liability in accordance with criteria arbitrarily devised by the courts[19] would have been avoided.

But the opportunity for adopting such a solution in Singapore and Malaysia has passed. The course of development of case law in these two states has been such that it is now too late to argue that the cases accepting strict liability were wrongly decided. The situation, perhaps, calls for the application of the maxim, *communis error ius facit*. Hence, it is best to proceed with the acceptance of strict liability in the law of this region as a *fait accompli* and look to the avenues of redressing any injustice that may accrue from the imposition of strict responsibility.

Judges in Singapore and Malaysia have relied exclusively on English authority in construing certain statutes as creating strict liability. They have effectively removed strict liability offences from the control of the principles of the Penal Codes and created an autonomous category of offences. In the formulation of future law, it is imperative that this silent evolution be acknowledged. There are several reasons for accepting this view. Firstly, the Penal Code itself was drafted at

---

16 Strangely, the leading case in this line of authority was also decided by Soertsz J. *Letchman* v. *Murugappa Chettiar* (1936) N.L.R. 19.

17 [1963] A.C. 160.

18 Law Reform Commission of Canada, Studies in Strict Liability (1974) p. 11, for similar views in England, see Law Reform Commission: Working Party, *Preliminary Paper on the Codification of Criminal Law: General Principles* Working Paper no. 17 (1968).

19 Sir Patrick Devlin, *Samples of Law Making* (1962) pp. 66-82.

a time when the law did not recognize the notion of strict liability offences.[20] The Code was designed prior to the advent of the modern welfare state which in the playing of a more paternalistic role has assumed many regulatory functions.[21] Secondly, even within the common law, strict liability offences are recognized as constituting an autonomous category.[22] The removal of strict liability offences from the control of the Penal Code can be justified on the ground that its objectives are different in that it is based entirely on a utilitarian philosophy which may condone the punishment of even the innocent in the hope of securing the goal of social protection from certain harmful activities.

Once it is recognized that there is a two track system of criminal law in Singapore and Malaysia — one track consisting of the Penal Code and other statutory offences subject to it and the second track consisting of statutory offences regarded by the courts as involving strict liability — then courts will be free to develop the second track of the criminal law untrammelled by any technicalities in the Codes. The Codes were designed at a time when social pressures did not make the imposition of strict liability necessary. They should not stand in the way of developing a modern principle in a relevant and just manner. This is particularly important in the case of the formulation of defences to strict liability. The formulation of such defences should not be tied to the statement of the defences in the Codes. The role that defences may have in strict liability are different. They must be defined broadly in situations where individual justice demands such a definition. They must be defined narrowly in circumstances where the objective of the legislation would be nullified by the acceptance of broad defences. Such flexibility is not permitted in the definition of the defences in the Codes. This factor, along with the recognition that strict liability offences are an autonomous category forming a second track of the criminal law, requires that a new and flexible approach be adopted in approaching the question of defences to strict liability. Before this is looked at, the reasoning behind the inference of strict liability is discussed so that the formulation of the defences could be looked at in the context of the justifications for strict liability articulated by the judges.

II. The Inference of Strict Liability

The inference of strict liability from the words of a statute creating an offence by reference only to the prohibited act involves judicial legislation. English courts have developed certain rules as to when strict liability should be inferred and these rules have been generally followed in Singapore and Malaysia. This reliance on English case law supports the theory of a two track system of criminal law for under the Penal Code, the Code provisions are paramount and the

20 The period of the drafting of the Code was between 1836 when McCaulay presented his draft and 1860 when the Indian Penal Code was enacted. Strict liability effectively dates from the case of *Prince* (1875) L.R. 2 Cr. Cas. Res. 154; R. Cross, "Centenary Reflections on Prince's Case" (1975) 91 L.Q.R. 540. The view that *Woodrow* (1846) was the first case on strict liability is not acceptable.

21 W. Friedmann, *The Rule of Law in a Mixed Economy* (1972).

22 F. Sayre, "Public Welfare Offences" (1933) 33 Colum. L.R. 55; G. Fletcher, *Rethinking Criminal Law* (1978) p. 717.

courts' task is to interpret the words of the section without the aid of external factors.[23]

From the point of view of Singapore law, the rules relating to the inference of strict liability were authoritatively stated in the opinion of the Privy Council in *Lim Chin Aik.*[24] This decision has been followed by several later decisions which will provide guidelines for the future. Among them are the more recent decision of the Privy Council on appeal from Hong Kong, *Gammon (Hong Kong) Ltd.* v. *A.G. for Hong Kong*[25] and the pronouncements of the House of Lords in *Sweet* v. *Parsley*[26] and *Alphacell Ltd.* v. *Woodward.*[27] It is necessary that the courts of this region also have regard to the decisions of Australia and Canada where certain innovative ideas relating to strict liability have been adopted.[28]

In *Lim Chin Aik,* the Privy Council referred to the basic principle of *mens rea* and the presumption that it forms a part of every crime is recognized. At this point, it is relevant to note that the principle of *mens rea* is not stated in the Codes. The Codes state the mental element involved in each of the crime it defines. It subjects them to the general exceptions in Chapter IV, many of which are based on the negation of a mental element.[29] Stephen, when drafting his Criminal Code for England in 1876 followed the technique of the Indian Penal Code and avoided stating a principle of *mens rea.* He thought the task of defining the principle was too difficult to accomplish.[30] There is no coherent theory of *mens rea* in the Penal Codes of Singapore and Malaysia. This being so, any reference to a presumption of *mens rea* must be to a principle which falls outside the Codes. This factor also supports the theory advanced earlier that strict liability offences form an autonomous second tract of the criminal law of Singapore and Malaysia. The presumption of *mens rea* and its displacement are the vital cogs of strict liability offences. *Lim Chin Aik,* when it referred to the presumption of *mens rea,* was clearly referring to an English principles. The Privy Council itself relied entirely on English cases to support its proposition regarding the presumption of *mens rea*[31]

23 This is again theoretical. English case law retains its vitality under the Codes but judges do pay lip service to the paramountcy of the sections of the Code.

24 [1963] A.C. 160.

25 [1984] 2 All E.R. 503.

26 [1970] A.C. 132.

27 [1972] A.C. 824.

28 In Canada, the Law Reform Commission has considered the question of strict liability (see above at note 3). The novel view adopted by the Australian High Court in *Proudman* v. *Dayman* (1941) 67 C.L.R. 536 is gaining ground in other jurisdictions. Further see C. Howard, "Strict Liability in the High Court of Australia" (1960) 76 L.Q.R. 547. For discussion of the Australian view in England, see *Sweet* v. *Parsley* [1970] A.C. at p. 158; for acceptance of the Australian view in Canada, see *City of Sault Ste. Marie* (1978) 40 C.C.C. (2d) 353; *Strasser* v. *Roberge* (1979) 103 D.L.R. (3d) 193; for New Zealand, see *Strawbridge* [1970] N.Z.L.R. 909.

29 For the view that the principle of mens rea is contained in the section of the Code on the defence of mistake of fact, see Bertram C.J. in *Weerakone* v. *Ranhamy,*

30 See Dixon J. in *Vattance* (1961) 35 A.L.J.R. 182; the draftsmen of the Australian Codes which were modelled on the English Draft Code of 1876 sought to supply this omission with varying levels of success. The complicated case law that has developed on their efforts may justify the position taken by Stephen.

31 *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918; *Brend* v. *Wood* (1946) 62 T.L.R. 462.

and did not pause to consider the possibility of accommodating it under the Code.

The second proposition in *Lim Chin Aik* is that having regard to the wording of the statute and the social objective it seeks to achieve, an offence created by a statute without any reference to *mens rea* could be construed to be an offence of strict liability. This result is more certain where the objective behind the statute is the prevention of harm in certain well recognized categories. The existence of such categories was accepted by the Privy Council when it said that immigration control did not fall within the categories. But, as that statement itself demonstrated, the list of categories is not exhaustive. A succinct judicial statement of the categories having regard to the historical evolution of the concept of strict liability is to be found in the judgment of Jackson J. in *Morisette* v. *United States.*[32] He said:

> The industrial revolution multiplied the number of workmen exposed to injury form increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks, if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispensed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly detailed and numerous regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

A more methodical categorisation was made on the basis of American case law by Sayre in 1933.[33] It is useful to set out Sayre's categories and point out that they are supported by case law in the Commonwealth. Sayre's categories, with the Commonwealth cases appearing in the footnotes, were: (1) illegal sales of intoxicating liquor,[34] (2) sales of impure or adulterated food or drugs[35] (3) sales of misbranded articles[36] (4) violation of narcotic acts[37] (5) criminal nuisances[38] (6) violation of traffic regulations[39] (7) violation of motor vehicle laws[40] (8) violation of general police regulations, passed for safety, health or well-being of the community.[41] Legislation under these categories exist in Singapore and Malaysia and the chances are that offences created by such legislation will be construed as creating strict liability offences.

32 (1952) 342 V.S. 249.

33 F.B. Sayre, "Public Welfare Offences" (1933) 33 Col. L.R. 55 at p. 73.

34 *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918.

35 For Malaysia, see *Pengurus, Rich Food Products v. P.P.* [1982] 1 M.L.J. 302.

36 *Ibid.* For a recent survey of legislation in this field, see Ho Peng Kees paper in the Collected Papers of the 2nd ASEAN Law Conference, 1984.

37 For the discussion of the law on this, see below at notes 135-139.

38 This is largely on the basis of the common law.

39 The Road Traffic Act and regulations under it.

40 Regulations on vehicle inspection and on maintenance on vehicles will come under this heading.

41 This was meant to be a broad residual category.

The categories mentioned by Sayre do not constitute a closed list. The growing importance of the subject of strict liability is evidenced by the fact that almost as many categories could be added on the basis of case law in the fifty years since Sayre wrote. There is authority for criminal legislation falling under the following categories being regarded as creating offences of strict liability: (1) environmental pollution: this has been an area of intense activity in most Western States[42] but in Singapore, concern with litter and waste disposal will lead to the creation of an increasing number of offences; (2) company and securities legislation:[43] in Singapore, where statutory offences have been seen as a means of ensuring the protection of Singapore's image as an international investment centre, recent amendments to the Companies Act may be seen as initiating a trend towards strict liability in this area,[44] (3) safety at building and industrial sites: again, intense building activity in Singapore, as in Hong Kong,[45] may give rise to more regulatory offences related to safety standards at construction sites (4) controlling inflation[46] (5) customs regulations[47] (6) fisheries regulations, particularly in Malaysia[48] (7) immigration control[49] (8) possession of firearms.[50]

As pointed out, the list cannot be regarded as exhaustive. The mere fact that the legislation refers to activity falling within one of the above categories is not conclusive as to the creation of a strict liability offence. It must further be shown that the imposition of strict liability will enhance the care taken by a person in control of the harmful activity. Since this requirement has an important bearing on some possible defences to strict liability, it must be examined more closely. It received authoritative statement in *Lim Chin Aik* in the following terms:[51]

> But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations.

42 *Alphacell* v. *Woodward* [1972] A.C. 824; *Impress (Worcester) Ltd.* v. *Rees* [1971] 1 All E.R. 357.

43 In Canada, legislation in this area has been held to involve strict liability *R.* v.*Slegg and Slegg Products Ltd.* (1974) 16 Crim. L. Qly 225; for Australia, see J. Kluver and R. Kluver, "Insider Trading: Strict Liability or Mens Rea" (1981) Cr. LJ. 209.

44 See *Straits Times,* 7th October 1984.

45 *Gammon (Hong Kong) Ltd.* v. *A.G.* [1984] 2 All E.R. 503.

46 *St Margarefs Trust Ltd.* [1958] 2 All E.R. 289; Smith and Hogan, *Criminal Law* (5th ed., 1983) p. 93 construe certain hire-purchase regulations as having this effect.

47 *Patel* v. *Commissioner of Customs* [1966] A.C. 356; *Fraser* v. *Beckelt* [1963] N.Z.L.R. 480.

48 Safe v. P.P. [1978] 1 M.L.J. 181; for England, see *Champion* v. *Maughan* [1984] 1 All E.R. 680.

49 *Lim Chin Aik* [1963] A.C. 160, see below n. 24.

50 See below n. 41.

51 [1963] A.C. at p. 174; the Privy Council cited in support *Reynolds* v. *G.H. Austin & Sons Ltd.* [1951] 2 K.B. 135 and *James & Son Ltd.* v. *Smee* [1955] 1 Q.B. 78.

> 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.

This requirement has been repeatedly asserted in recent cases.[52] Its recent assertion was in *Gammon (Hong Kong) Ltd.* v. *A.G. for Hong Kong*[53] where Lord Scarman said that "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". The requirement is a logical consequence of the deterrent aim behind the imposition of strict liability. Since only those in control of events who had not exercised adequate care need to be deterred, the punishment of those who had exercised such care but nevertheless caused the prohibited consequences does not serve the purpose of deterrence.

There are other factors which courts have suggested may indicate whether a statutory offence is one of strict liability or not. These are subsidiary factors which may assist in the making of a conclusion. The severe nature of the penalty may indicate that the offence requires *mens rea* but this is not necessarily so.[54] In Singapore and Malaysia, many strict liability offences carry heavy penalties. The attempt at reviving the old distinction between *mala in se* and *mala prohibita,* however valid it may be in England, does not have relevance in this region.[55] Likewise, the fact that all other sections in criminal statutes refer to *mens rea* but one section does not is not conclusive either way as to whether strict liability was intended.[56]

The courts in Singapore and Malaysia may show a greater readiness to recognize strict liability. Lord Diplock's statement that "the climate of both parliamentary and judicial opinion has been growing less favourable to the recognition of absolute offences over the last few decades"[57] may be true for England. It is not accurate for Singapore and Malaysia where social pressures have led to the creation of many strict liability offences. The creation of such offences is seen as a panacea to many social problems and that attitude is supported by the prevailing philosophy of deterrence. Nevertheless, there is a need to ensure that the innocent are not sacrificed in the pursuit of objectives, particularly in view of the fact that there is no evidence to show that the imposition of strict liability does in fact secure the desired objective more effectively.[58]

To some extent, the formulation of strict guidelines for the inference of strict liability itself provides a safeguard for the accused. The

52 See e.g. *Sweet* v. *Parsley* [1970] A.C. 132 at p. 157.
53 At p. 508.
54 *Patel* v. *Controller of Customs* [1966] A.C. at p. 363.
55 Such an effort is credited to Lord Reid in *Warner* [1969] 2 A.C. 256 at p. 271 where he said: "… we are dealing with minor penalties which do not involve the disgrace of criminality". On the distinction and its uselessness, see Williams, *Textbook of Criminal Law,* p. 936. Also see Timappa (1901) 3 Bom. L.R. 678.
56 *Champion* v. *Maughan* [1984] 1 All E.R. 680.
57 *Sheppard* [1980] 3 All E.R. 899 at p. 906; in fairness, it must be noted that Lord Diplock refers to "absolute" rather than "strict" liability.
58 C. Howard, *Strict Responsibility* (1963) p. 2; Howard himself recognized the existence of defences to strict liability crimes; see pp. 199-207 of his book.

accused could argue that the statute should not be regarded as creating a strict liability offence. If the argument succeeds, the offence would fall within the first tract of the criminal law and all the defences available under the Penal Code are open to the accused. If the statute does create a strict liability offence, certain defences are still available to the accused. It is in the strengthening and the precise formulation of these defences that the bringing about of a balance in the conflict between the interest of the accused to justice and the interest of society to be protected from hazardous activity.

III. THE DEFENCES TO STRICT LIABILITY

The availability of defences to statutory offences which emphasize only the prohibited act and exclude references to *mens rea* is evident in the slow replacement of the notion of absolute liability with that of strict liability. Howard who wrote his work on strict liability in 1963 saw no difference between the two terms.[58] Yet, it is common-place now to regard the use of the term absolute liability as misleading.[59] It properly belongs to a period when it was thought that no defences were open to an accused once it had been proved that he had committed the prohibited act.[60]

The transformation from absolute to strict liability was in recognition of the fact that some middle ground or compromise, which would prevent the imposition of punishment on those whose punishment will serve no social purpose, was needed. The transformation is based on sound policy grounds. If the aim of strict liability is the deterrence of socially harmful behaviour, this aim cannot be furthered by the punishment of the obviously innocent. In fact, the punishment of the innocent could attract public opprobrium to the law. Lord Reid made this point forcefully when he said that "every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and its administration.[61] The recognition of defences to strict liability is a way of avoiding this.

Prior to examining the defences, certain techniques used in avoiding the conviction may be briefly stated. The first relates to statutory interpretation. Judges have insisted on the strict construction of criminal statutes and avoided the conviction of the innocent. A classic illustration is provided by the judgment of the Privy Council in *Liew Sai* Wah[62] where the charge was one of possessing an explosive substance, an offence under the Internal Security Act. The accused had six hand grenade casings. They were not complete grenades as they lacked levers, safety pins, detonators and base plugs. The trial judge and the Federal Court held that they came within the definition of

59 Smith and Hogan, *Criminal Law, p.* 87.

60 A case like *Larsonneur* (1933) 24 Cr. App. Rep. 74 widely regarded as a "blot on English jurisprudence" was possible during this period.

61 *Sweet* v. *Parsley* [1970] A.C. at p. 150. The point is also made by G. Williams, *Textbook of Criminal Law,* p. 931: "Little purpose is served by additing to the large numbers of truly guilty defendants the small number of persons who are really innocent. The social argument is all the other way. For, whereas natural evils can often be accepted as part of the price of living, a man-made evil may be strongly and even bitterly resented because it felt to be unjust".

62 [1968] 2 M.L.J. 1 followed by Lord President Suffian in *Leong Kuai Hong* [1981] 1 M.L.J. 246.

ammunition but the Privy Council reversed it on the ground that the "Internal Security Act is a penal act and must be construed strictly".

Another point relating to statutory interpretation is that there is an inference that certain defences are available to all offences created by statutes. The inference was stated by Cross in the following terms:[63]

> No statutory crime is defined in such a way as to admit in ordinary language of such defences as insanity, duress and necessity. But is has never been contended that these defences are not available".

If this is be so, then certain defences are inherent in the statute. But the point that the defences Cross mentioned are open on grounds other than those of statutory interpretation is developed later on in this paper.

The second factor which avoids the conviction of the innocent is the exercise of prosecutorial discretion. In England, courts have encouraged the adoption of such a course in statutory offences.[64] Studies have shown that such a discretion is exercised in England by inspectors who are entrusted with the task of maintaining standards of health and safety.[65] More recently, a research study of a Royal Commission on Criminal Procedure found that in the area of environmental health, food and drugs legislation, enforcement officers regarded prosecution as a last resort, favouring initially methods of persuasion and warning.[66] Though "the secretly exercised discretion of middle range executives" is not the answer where an innocent person has actually been charged, encouragement of the discretion will ensure that the innocent are not charged unless there is a valid social reason for doing so. Where an innocent person has in fact been charged, the magistrate has the discretion to caution and discharge the accused rather than impose a punishment. Such a discretion exists in the magistrate under s. 173A of the Criminal Procedure Code in Malaysia and Singapore. This may however not be possible where the statute makes the imposition of the penalty mandatory. With these observations, the defences to strict liability may now be looked at.

A. Act Related Defences

(1) *Necessity*

The theory of defences to crime proceeds on the basis that if circumstances which negative either the *actus reus* or the *metis rea* of the crime had existed at the time of the crime, the accused should be acquitted.[68] Statutory offences of strict liability exclude the need for

63 R. Cross, *Statutory Interpretation* (1976) at p. 58; also see p. 143.

64 Viscount Dilhorne in *Smedleys Ltd.* v. *Breed* [1974] A.C. at p. 856; also see D.A. Thomas, "Form and Function in Criminal Law" in P. Glazebrook, *Reshaping the Criminal Law,* 21 at p. 30; C. Wells, "Swatting the Subjectivist Bug" [1982] Crim. L.R. 208 at pp. 218-219.

65 The first study found that this was not the case in the enforcement of the Foods and Drugs Act. M. Smith and A. Pearson, "The Value of Strict Liability" [1969] Crim. L.R. 5; but a later study contradicted the findings and showed that discretion was used in the enforcement of the Factory Act. W.G. Carson, "Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation" (1970) 33 M.L.R. 396.

66 Royal Commission on Criminal Procedure; Research Study No. 10 Cmnd. 8092, (1981).

67 *Yong Thiam Fatt* [1979] 2 M.L.J. 145; *layanathan* [1973] 2 M.L.J. 68.

68 G.P. Fletcher, *Rethinking Criminal Law* (1978) pp. 511-514; 552-579; 759-769; G. Williams, "The Theory of Excuses" [1982] Crim. L.R. 732.

proof of *mens rea* and, *a fortiori,* exclude the defences based on *actus reus.* Alternatively, using the analysis made by Fletcher of defences to criminal liability,[69] a distinction could be made between justification and excuse. Excuses are those defences which are based on the law's compassion towards offenders who had committed the offence under overwhelming pressures[70] and offenders who suffer from some disability like insanity or intoxication. Justificatory defences, like self-defence and necessity are based on the existence of a right in the offender. The accused who acts in self-defence or in circumstances of necessity is excused because he exercises a right. Necessity in effect is the wider defence, for self-defence is an aspect of necessity.[71] Statutes creating strict liability exclude excusing conditions but should not be read as excluding the justificatory defences. The latter defences, being dependent on rights, should not be regarded as displaced unless there is a clear indication in the statute that they do not apply.

In supporting this view, for which authority is admittedly meagre, regard must be had to penal policy as well. If deterrence is the aim behind strict liability, it is obvious that where there is a present situation of extreme necessity, future threat of punishment, which is often trivial by comparison to the present danger involved in the situation of necessity, is unlikely to have any deterrent effect.[72] In these circumstances, the law will only stultify itself if it insists on a penalty.

From the point of view of strict liability offences, the scope of the defence of necessity should be widened. What should be aimed at is the development of a new defence based upon the existence of overwhelming pressures involved in the circumstances in which the accused finds himself, compelling the commission of the prohibited act.[73] In Singapore and Malaysia, unlike in England,[74] there is no need to assert that a defence of necessity exists as s. 81 of the Penal Code states the defence. What is contended for however is that in the second tract of the criminal law which includes strict liability offences, the scope of the defence of necessity as a defence for such offences is justified by the fact that the harm involved in the situation of necessity which is being averted is often greater than the harm which the statutory prohibition seeks to avoid. This point will be made clearer as the discussion of necessity as a defence progresses.

It is necessary to find authority for the view that necessity is a defence to strict liability. Authority is meagre and is confined to dicta in cases. The most cogent argument is in the logical absurdity involved in not recognizing the defence. Take for example, the prohibition order involved in *Seah Eng Joo.*[75] The statute made it an offence of strict liability for a person subject to the prohibition order to leave

69 *Ibid.*

70 Examples would be duress and provocation. The House of Lords in Camp/in [1978] 1 All E.R. 1236 regarded provocation as a "concession to human frailties" It will be argued later on that duress is a defence to strict liability offences.

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

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

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

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

75 [1961] 2 M.L.J. 252; compare for Malaysia, *Ayavoo* [1966] 1 M.L.J. 242.

his home during the hours specified in the order. Had a fire broken out at the offender's house, it would be highly illogical to argue that the offender should have continued to remain in the burning house than violate the prohibition order. Necessity must provide a defence in such circumstances.

In English law, there is authority both for and against the acceptance of necessity as a defence to strict liability. But the contrary authority in England must be rejected because it flows from the traditional ambivalence of the English law to the defence of necessity.[76] The authority against the recognition of necessity as a defence to strict liability is *Kitson,*[77] where an intoxicated man, sleeping in a car woke up to find that he was alone in the car and that the car was moving downhill. He grabbed the steering wheel and steered the car onto a grass verge. He was convicted of driving under the influence of drink, a strict liability offence under the Road Traffic Act (1930). The absurdity of the decision is apparent upon the mere reading of the facts and the verdict.[78] Surely the law does not expect the person in such circumstances to do nothing despite the possibility of danger to his life. A possible reading of another case, *Johnson* v. *Phillips,*[79] may be that a motorist who reverses the wrong way up a one way street so that an ambulance may pass will be violating the traffic regulations. Such a reading of the case would provide authority against the defence of necessity. These decisions are clearly unjust. They go against common sense.[80]

The authority supporting the use of necessity in the English law is weak. Howard supports the use of the defence with many qualifications when he observed:[81]

> One can only say, more by way of rational policy than ordered interpretation of the law, that if the facts are sufficiently dramatic, necessity, impossibility and inevitable accident will furnish defences even to strict liability prosecutions; but how dramatic the facts have to be is obscure.

The position that necessity should be a defence to strict liability offences, though it is not, has been stated, *obiter dicta,* by Lord Denning in an answer to a hypothetical example in the following terms:[82]

> During the argument I raised the question: might not the driver of a fire engine be able to raise the defence of necessity? I put this illustration. A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing

76 See footnote 74.

77 (1955) 39 Cr. App. R. *66* relying on *Saycell* v. *Bool* [1948] 2 All E.R. 83.

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

79 [1976] 1 W.L.R. 65; the case is criticised by Smith and Hogan, at p. 204.

80 The remedy suggested by the Law Commission in its Report on Defences of General Application that the solution lies in the exercise of prosecutorial discretion is hardly satisfactory. The law should provide a defence in such circumstances so that guilt is extinguished.

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

82 *Buckoke* v. *Greater London Council* [1971] 2 All E.R. 254 at p. 258.

> house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for sixty seconds, or more, for the lights to turn green? If the driver awaits for that time, the man's life will be lost. I suggested to both counsel that the driver might be excused in crossing the lights to save the man. He might have the defence in law. The circumstances went to mitigation, they said, and did not take away his guilt. If counsel are correct — and I accept that they are — nevertheless such a man should not be prosecuted. He should be congratulated.

A law which holds a man who should be congratulated, guilty of a crime is not much of a law. Lord Denning should have followed his instincts and stated the view that necessity is a defence under the circumstances he envisaged.

In Scotland, there is direct authority favouring the availability of the defence of necessity to charges involving strict liability provided by the recent case, *Tudhope* v. *Grubb.*[83] The accused who was in a drunken condition had gone to the garage where he had left his car for repairs. There, an altercation had arisen between the accused and the owner of the garage. The accused was assaulted by the garage-owner and his friends. He escaped to the safety of his car and locked himself inside it. But the men tried to smash the windows of the car. He tried to start the car but the battery was flat. The police arrived on the scene and, after all that misery, the accused was charged with attempting to drive a car with an excess of alcohol in his blood, contrary to the Road Traffic Act, 1972. The court acquitted the accused on the basis of necessity. Whether such a result would have been reached in England is uncertain because of the disfavour with which the defence is viewed in England.[84] In view of the fact that necessity is accepted as a defence in the criminal law of Singapore and Malaysia, there will be a greater receptivity to the Scottish view in these states.

The Malaysian case in which the scope of necessity could have been tested out is *Ali bin Omar.*[85] There, an Indonesian boat carrying a cargo of tin ore had lost its rudder while in the high seas. It had put into a Malaysian port. The captain was charged under the Customs Act of bringing in a dutiable item into port. The judge held that the customs regulations did not create an offence of strict liability. Hence, since *mens rea* was a relevant ingredient in the offence, the necessity involved in the circumstances negatived the *mens rea.* This is faulty reasoning. Firstly, there is overwhelming authority in Malaysia, Singapore and elsewhere[86] that the prohibitions in the Customs Act and regulations under it create offences of strict liability. Secondly, necessity as a defence operates, not by negativing *mens rea* for the offender quite consciously and intentionally chooses to do the prohibited act but by negativing the element of *actus reus.* The law permits the doing of the prohibited act so that a greater harm could be avoided. The case was rightly decided but for the wrong reasons. The proper

[83] [1983] S.C.C.R. 350; M. Wasik, "A Case of Necessity?" [1984] Crim. L.R. 545.
[84] Wasik, *ibid.*
[85] [1982] 2 M.L.J. 51.
[86] *Koo Cheh Yew* [1980] 2 M.L.J. 235; *Lee Ah Kow* [1982] Malaysian Current Law Journal 561.

reasoning on the facts should have been that the Customs Act created an offence of strict liability but that the violation of the prohibition in situations of extreme necessity cannot be regarded as an offence, because the prohibition was not intended to be applied in such situations.

In such circumstances, it is unnecessary, as the court did in *AH bin Omar,* to refer to the section on necessity in the Penal Code. What is advocated is the creation of a broad defence for the second track of the criminal law which would involve all situations involving external pressures which compel the accused to breach the prohibition. This would include usually situations of necessity and duress.[87] Take for example based on the prohibition order involved in *Seah Eng Joo.*[88] During the hours specified in the order a quarrel breaks out between the accused and his wife. The wife threatens to jump out of the window of their high rise flat if the accused does not leave the flat and is sitting on the ledge of the balcony. The accused leaves. He has technically violated the prohibition order. It is clear that the accused should not be found guilty for he is securing the higher value of preserving his wife's life by making a minor transgression of the law. Yet, neither necessity nor duress as defined in the Code will provide a defence. Necessity will not, simply because the provision on duress is intended to provide for the situation of duress. Duress will not, because the situation provided by the section applies only to the case where the accused himself is subjected to the threat. In this context, it is valid to argue that the second track of the criminal law should create a comprehensive defence which includes within it features of both necessity and duress that is flexible enough to accommodate situations where the offender broke the statutory prohibition in order to secure a more important value.

B. Other Act Related Defences

Since strict liability offences focus on the commission of the prohibited act, any factor which breaks the link connecting the commission of the act and the accused will provide a defence to the accused. Likewise, where the condition of the accused was such that he could not have committed a voluntary act, then too be could not be said to have committed a relevant act from which liability could flow. These two propositions disclose defences which could be discussed under the following headings: (1) Non-satisfaction of causation due to third party intervention (2) act of God (3) involuntariness due to automatism. Most of the authorities for these defences are in Commonwealth precedents but, on the basis that the second track of the criminal law in Singapore and Malaysia are dependent on the acceptance of these precedents, it is submitted that these defences have a valid role to play in the law of these states.

1. *Third Party Intervention*

Parker v. *Alder,*[89] a case in which it was held that intervention by a third party which was responsible for bringing about the prohibited consequences cannot provide a defence to strict liability offences has

[87] It is accepted in Commonwealth cases that duress is a defence to strict liability. E.g. *O'Sullivan* v. *Fisher* [1954] S.A.S.R. 33; Howard, *Strict Responsibility,* pp. 193-200.

[88] [1961] 2 M.L.J. 252.

[89] [1899] 1 Q.B. 20; it was found as a fact that the farmer was telling the truth.

been so battered with criticism that it cannot be considered good law any longer.[90] In that case, the accused a farmer, had despatched milk to the vendee in London by train. He delivered good milk in properly sealed containers for transport to London but some unknown person had adulterated the milk while it was in transit to London. He was found guilty of selling adulterated milk while it was on transit by train to London. The imposition of liability on the accused has been criticised on the ground that he had done everything within his power to ensure that the milk he sold was unadulterated. Though the sacrifice of the absolutely innocent is not unknown in English law,[91] there is now a welcome trend away from such a position and a greater readiness to consider third party intervention as a defence.

Impress (Worcester) Ltd. v. *Rees*[92] is indicative of the trend. In this case, an unknown person had entered the premises in which the accused had fuel oil storage tanks and opened the gate valve of a tank. The oil escaped into a river and the accused was charged with an offence under the Rivers (Prevention of Pollution) Act. Cooke J. referred to the need to consider "general and well understood principles of causation" in determining the liability of the accused. He regarded the opening of the valve by the unauthorised person as an intervening cause which was "of so powerful a nature that the conduct of the appellants was not a cause at all but was merely a part of the surrounding circumstances".

It must be recognized that third party intervention is not always a defence. The question could be raised as to whether the imposition of liability in a case like *Impress (Worcester) Ltd.* v. *Rees* would have resulted in the offender and those in a like situation taking greater security precautions against interference by third parties. Considering the environmental harm that pollution could cause, such a course may seem desirable.[93] The question has also been raised as to whether an accused could escape liability by pointing out the person responsible for the act. Where this happens, it is possible to argue that, in the absence of any fault in the accused, he should be discharged and that fresh charges should be brought against the person who really caused the harm. If conviction results, the possibility remains that an action in tort could be brought against the third party who committed the act.

(2) *Act of God*

In *Alphacell* v. *Woodward,*[94] counsel for the appellant had argued that if the intervening act was one "which no human ingenuity could have foretold"[95] then that act should be characterized as an act of

90 For criticisms of the case, see G. Williams, *Textbook,* pp. 930-932; Howard, *Strict Liability,* p. 26.

91 See e.g. *Slatcher* v. *Smith* [1951] 2 K.B. 631; *Towers* v. *Gray* [1961] 2 Q.B. 351; *Strong* v. *Dawtry* [1961] 1 W.L.R. 841; *Larsonneur* (1933) 24 Cr. App. R. 74.

92 [1972] 2 All E.R. 357; Smith and Hogan, *Criminal Law* p. 99 at note 18 cite another case *Stronger* v. *John* [1974] R.T.R. 124 as indicating such a trend.

93 In *Alphacell* v. *Woodward* [1972] A.C. at p. 835 Lord Wilberforce recognized the existence of the third party intervention defence but qualified it by stating that it may not apply in all circumstances.

94 [1972] A.C.

95 *Ibid.,* at p. 831; the argument was accepted in the lower court by Bridge J; see [1972] 1 Q.B. 127 at p. 137; for the use of act of God as a defence in a defence in a different sense, see Lord Goddard in *Walmore* v. *Jenkins* [1962] 2 Q.B. 572.

God and a defence should be allowed. Lord Cross considered the argument more fully than the other Law Lords. Referring to the argument that the pollution was caused by the leaves which clogged the impellers of the pump used in the recycling of the polluted water and that this was not the fault of the accused, Lord Cross said:

> This argument is plausible — but I think fallacious. The appellants did not show that the brambles had been placed there by a trespasser or that the inanimate forces which brought them there were in the category of acts of God — analogous to the destruction of the pumps by lightning or the flooding of the tank by a storm of altogether unexampled severity and duration.[97]

The dicta recognizes that the occurrences of events beyond the control of the accused could provide a defence to strict liability offences. But the statement of the defence is carefully circumscribed. If the accused could reasonably have anticipated the occurrence of the event and taken sufficient precautions, the defence will not be available. In matters such as pollution, anticipation of obvious risks and the taking of precautions against them may be required. In a New Zealand case, it was suggested that an omission to take such precautions "would probably satisfy the test of recklessness, which is not uncommonly sufficient to constitute *mens rea* in the strict sense.[98]

(3) *Involuntariness*

It is generally accepted that criminal liability can only be based on a conscious and voluntary act.[99] An involuntary commission of a prohibited act cannot be the basis of liability even for strict liability offences. This has been recognised in a series of English decisions.[1] An opportunity for formulating a similar doctrine for strict liability offences was missed in *Ayavoo*.[2] In that case, the accused had been subjected to an order under the Prevention of Crime Ordinance to remain indoors after dusk. Cycling home after a dinner so that he could get back to his home before the hour specified in the order, the accused fell over a bridge and became unconscious. He recovered consciousness only after being taken to hospital. He was charged with having breached the prohibition order. The case should have been disposed of on the simple ground that the prohibition order could not have been breached by a person in a state of unconsciousness. Instead, knowing that a conviction on such facts was not morally acceptable, the judge adopted a rather convoluted reasoning. He held that the statute did not create strict liability. Hence, since *mens rea* was relevant, the judge held that the accused could not have entertained the relevant *mens rea* as he was unconscious. He acquitted the accused on this basis. The result was sound, but the reasoning was faulty.

96 *Ibid.,* at p. 846.

97 Also see Lord Pearson, *ibid.,* at p. 845; Lord Salmon, *ibid.,* at p. 847. For a consideration of these dicta in New Zealand, see *Ministry of Transport* v. *Burnetts Motors Ltd.* [1980] 1 N.Z.L.R. 51 at p. 58.

98 *Ministry of Transport* v. *Burnetts Motors Ltd.* [1980] 1 N.Z.L.R. 51 at p. 58.

99 Smith and Hogan, *Criminal Law,* pp. 37-39.

1 *Hill* v. *Baxter* [1958] 1 Q.B. 277 at p. 286; *McBride* [1962] 2 Q.B. 167; *Kay* v. *Butterworth* (1945) 173 L.T. 191; for Australia, see *Carter* [1959] V.R. 105; generally see, M. Budd and A. Lynch, "Voluntariness, Causation and Strict Liability" [1978] Crim. L.R. 74; I. Patience, "Some Remarks about the Element of Voluntariness in Absolute Offences" [1968] Crim. L.R. 23.

2 [1966] 1 M.L.J. 242.

In Singapore, the corresponding legislation, a provision in the Criminal Law (Temporary Provisions) Ordinance, 1951, was held to create a strict liability offence in *Seah Eng Joo.*[3] This was correct for the purpose of the legislation was the prevention of crime by confining certain types of persons to their homes. The reasoning adopted in *Ayavoo* was perhaps influenced by the misapprehension that once an offence is characterized as a strict liability offence, no defences are possible. That, as has been demonstrated, is not so.

An actual instance where a defence akin to involuntariness was attempted was in *Wong Swee Chin*[4] where the accused was charged under the Internal Security Act of Malaysia with the possession of firearms. There had been a gun battle between a gang and the police in the course of which the police had used tear gas. The case for the accused was that when he was found by the police he was unconscious as a result of having sustained seven gun shot wounds and having inhaled the tear gas. He argued that he was not in "conscious possession or control" of the weapons and ammunition found on him. The court, however, found as a matter of evidence that the accused was in fact conscious. The need, which the appellate court felt, to examine the evidence at the trial may be taken as an indication that the argument was taken seriously and that had the accused really been unconscious the decision may have been different. But this is unlikely. On such facts, the inference can be drawn that the accused had the arms in his possession prior to losing consciousness and such an inference is sufficient to result in conviction unless, of course, the accused is able to show that the firearms were planted on him after he had lost consciousness. *Wong Swee Chin* can be interpreted as providing for this possible defence.[5]

Generally, the plea of non-insane automatism is available to an offence of strict liability as an accused in such a state could not have committed a voluntary act. In the case of insane automatism, policy reasons require that the accused be dealt with as in the instances where insanity succeeds as a defence to other crimes. Such a course of action is justified on the basis of social defence.[6] The distinction between sane and insane automatism is well recognized in Commonwealth law particularly after the decision of the House of Lords in *Sullivan.*[7] The fact that non-insane automatism as a defence to criminal liability is not provided for the Penal Code need not deter its use as a defence to strict liability.[8] As has been argued, strict liability offences do not fall within the control of the general principles of the Penal Code. Since they are to be treated as autonomous, it can be argued that all defences which accord with principle must be considered by Singapore and Malaysian courts, particularly if they have been accepted in other Commonwealth jurisdictions. On this basis, it is possible to argue

3 See n. 88.

4 [1981] 1 M.LJ. 212.

5 An argument that possession is not an act seems to have been made by David Marshall, Q.C. in *Seow Koon Guan* [1978] 2 M.L.J. 45. The fact that the judgment does not consider it is definitely a reflection on the argument.

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

7 [1984] 1 All E.R. 83.

8 On automation, see *Sinnathamby* [1956] M.L.J. 36; on whether it could be used in Malaysia and Singapore, see S. Yeo, "The Application of English Common Law Defences to the Penal Code" (to be published).

that where an accused commits the prohibited act involved in a strict liability offence while in a state of automatism brought about by factors external to the accused, he may successfully plead automatism.

The notion of involuntariness may also include circumstances where the accused is fully conscious but his only logical course of action under the circumstances is the commission of the prohibited act. This idea has been developed in the New Zealand case, *Kilbride* v. *Lake*.[9] The accused had parked his motor car and on his return, he found that the warrant of fitness displayed on the windowscreen had disappeared. He was charged under the traffic regulations with driving a car on which a current warrant of fitness was not displayed. The accused could have been acquitted on the basis of third party intervention. But Woodhouse J. sought to base the acquittal on a broad definition of voluntariness. He suggested that where the freedom to take any other course than the commission of the prohibited act had been destroyed by events, then the conduct of the accused must be regarded as involuntary. He observed:[10]

> In the present case there was no opportunity at all to take a different course, and any inactivity on the part of the appellant after the warrant was removed was involuntary and unrelated to the offence. In these circumstances I do not think it can be said that the *actus reus* was in any sense the result of his conduct, whether intended or accidental.

The reasoning adopted here is artificial. It is improper to regard the act of the accused in driving the car after the warrant had disappeared as "involuntary and unrelated to the defence" when it was a deliberate act on the part of the accused done with the knowledge that the warrant was missing. The decision is much admired [11] and discussed in subsequent New Zealand cases.[12] Though the result in it is to be applauded, the notion of involuntariness stated in it is too broad. The decision could have been better explained on the basis of a broad necessity-related defence. Faced with the choice of leaving the car on the street and going home by some other means and recovering the car after the formalities relating to the loss of warrant had been attended to, the accused chose the less tedious alternative. The wide formulation of a necessity based defence as advocated in this paper would have provided a defence without subverting basic principles.

C. Defences Based On Lack of Negligence and Fault

In Australia, a series of decisions have created defences to strict liability offences based on the absence of negligence on the part of the accused. Scope has been given to the view that a person who had taken all possible care to avert the commission of the prohibited act should not be found guilty through the defence of mistake of fact.[13] The Australian initiative has been built upon in Canada and New Zealand

[9] [1962] N.Z.L.R. 590.
[10] *Ibid.,* at p. 593.
[11] I. Patience, "Some Remarks about the Element of Voluntariness in Absolute Offences" [1968] Crim. L.R. 23.
[12] *Tfiga* v. *Department of Labour* [1980] 2 N.Z.L.R. 235 where Woodhouse J. had occasion to explain *Kilbride* v. *Lake; Police* v. *Creedon* [1976] 1.
[13] *Proudman* v. *Dayman* (1941) 67 C.L.R. 536; *Green* v. *Sergeant* [1951] V.L.R. 500; *Gherashe* v. *Boase* [1959] V.R. 1.

and there are signs of its acceptance in England. Parallel to this development is the notion that a person who is faultless and who could not have avoided the commission of the prohibited act should not be found guilty.

These defences have a relevance for Singapore and Malaysia because they are essentially based on the rationale stated in *Lim Chin Aik,*[14] the leading decision on strict liability in this region, for the imposition of strict liability. There, the Privy Council stated that strict liability is imposed by statutes to ensure the maintenance of certain standards of safety, honesty, etc. and that the imposition of such liability on a person who could not avert the harm despite the taking of reasonable care is not to befavoured. The formulation of this rationale by the Privy Council in a binding Singapore decision opens the possibility of mistake of fact which is based on the absence of negligence on the part of the accused to be a defence. Equally it provides justification for the acceptance of other defences based on the absence fault. These defences may be now considered.

(1) *Conditional Factors and Mistake of Fact*

The judgment of the Australian High Court in *Proudman* v. *Dayman* [15] is the starting point for any discussion of the applicability of mistake of fact as a defence to offences of strict liability. There the accused was charged with an offence under the Road Traffic Act of allowing an unlicensed driver his car. The accused contended that for his conviction, "it must be shown, not merely that the driver was unlicensed, but also that the defendant knew it or at all events was indifferent to the question whether he was licensed or not". The accused was convicted and the High Court dismissed her appeal. Her argument that she thought that the driver was licensed was insufficient to provide a defence. Dion J. observed that "the applicant assigned reasons for her alleged belief which neither the magistrate nor the Full Court found convincing or sufficient. Indeed, it may be doubted if she thought at all upon the question whether the person she permitted to drive her car did or did not hold a subsisting license". It is clear from the judgments of Rich A.C.J. and Dion J. that had the belief of the accused been based on a reasonable foundation, then the accused would have been acquitted. Her conviction was based, in essence, on her negligence in not finding out. *Proudman* v. *Dayman* is authority then for the proposition that wherever a strict liability offence involves a conditional factor (in that case, the driver being unlicensed) a reasonable mistake of fact will provide a defence to the offence. The defence is based on sound policy grounds. If all reasonable precautions had been taken by the accused to prevent the commission of the prohibited act, no objective is achieved by his conviction and punishment. It cannot serve a deterrent aim.

In effect, the type of strict liability offences which contain such conditional factors constitute an intermediate category of offences falling in between absolute liability and liability based on *mens rea* in that they are based on the mental element of negligence. This is the theme that has been followed in the cases in Australia and elsewhere

[14] [1967] A.C. 160.
[15] (1941) 67 C.L.R. 536.

which have built upon the foundations of *Proudman* v. *Dayman.*[16] Academic commentators have also received these developments favourably.[17] The Canadian Law Reform Commission suggested that extending this development and using negligence as the least necessary element in all statutory offences is the solution to the problem of strict liability.[18] The House of Lords judgments have also shown favour towards the development of an intermediate category of strict liability.[19]

These developments have influenced decisions in Malaysia and Singapore. It is useful to categorize these cases and discuss them in comparison with the cases from the Commonwealth.

(a) Cases where the statute provides for the defence of due diligence: The Malaysian case, *Melan bin Abdullah*[20] provides an illustration of the situation in which the statute itself provides for a defence where the accused had exercised due diligence in the conduct of the activity. The editor-in-chief of a group of newspapers was charged with having allowed the publication of an item relating to a speech made by a politician on the abolition of Chinese and Tamil medium schools. He was charged and convicted under s. 4(1)C of the Sedition Act which makes it an offence to "print or public any seditions publication". The accused appealed against the conviction. His case was that he was editor-in-chief of a group which brought out ten publications and employed over 140 persons. He could not read every item published in them to ensure that no violation of the Act took place. He had to delegate authority to subordinates. He had organised seminars and discussions on the Sedition Act for the staff and had the Attorney General and the Solicitor General talk to them about the Act. He relied on s. 6(2) of the Sedition Act which stated that no one should be convicted under the act if the seditious matter was published "without any want of care or attention on his part". Ong CJ. acquitted the accused, holding that this was "a striking instance of the type of cases where, as Dr. Williams put it: 'There is a halfway house between *mens rea* and strict liability which has not yet been properly utilized and that is responsibility for negligence' ". He also relied on dicta in *Sweet* v. *Parsley*[21] and *Lim Chin Aik*[22] to support this view and held that the "accused had not failed in the higher standard of care and caution required of him". Support for the approach that was adopted could be found in the more recent decision of the Privy Council in *Gammon (Hong Kong) Ltd.* v. *A.G. for Hong Kong.*[23] The application of Ong C.J.'s approach does not depend on the existence in the statute of an express provision like s. 6(2) of the Sedition Act

16 For Canada, see *City of Sault Ste Marie* (1978) 85 D.L.R. (3d) 161; *Strasser* v. *Roberge* (1979) 103 D.L.R. (3d) 193; for New Zealand, see *McKenzie* v. *Civil Aviation Department* (1984) 8 A. Cr. L.J. 54; *Strawbridge* [1970] N.Z.L.R. 909; *Police* v. *Creedon* [1976] 1 N.Z.L.R. 571.

17 N. Morris and C. Howard, *Studies in Criminal Law* (1964) pp. 200-201; for South Africa, see Milton, "Reasonable Mistake of Fact as a Defence to Statutory Offences" (1971) 88 S.A.L.J. 70; for Canada, see A.W. Mewett and M. Manning, *Criminal Law* (1978) at pp. 133-135.

18 Law Reform Commission of Canada, *Our Criminal Law* (1977) p. 22.

19 E.g. *Sweet* v. *Parsley* [1970] A.C. 132 at p. 150.

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

21 [1970] A.C. at p. 157.

22 [1963] A.C. at p. 174.

23 [1984] All E.R.

> which makes the exercise of reasonable diligence a defence. It is to be read into every statute of strict liability. This, in effect, was the approach adopted by the Canadian Law Reform Commission in its study on strict liability.[24]

There are other cases besides *Melan bin Abdullah* in Malaysia which could be construed as supporting an approach based on negligence. In *Osman bin Apo Hamid*[25] where the charge was one of transporting rice in quantities above those for which the accused had a permit, a defence was raised that the accused had not looked at the permit too closely. Abdul Razak J. dismissed this defence with the observation that such a failure amounted to "gross negligence". The judge, after holding that the offence was one of strict liability, need not have spoken of "gross negligence" for the type of defence that was raised would not have been admissible on a classic theory of strict liability. The fact that he felt the need to refer to gross negligence is an indication that he would have been prepared to accept absence of negligence or mistake of fact as a defence.[26]

In *Pengums, Rich Foods Products Sdn. Bhd.*[27] the accused had sold fish floss. An Inspector of Sale of Food and Drugs had bought six packets of the floss and sent it for chemical analysis. The analysis showed that the floss had a content of mercury and that this was not disclosed in the label on the packet as required by the Sale of Food and Drugs Ordinance. The accused said that the mercury was in the fish and that she had not used it in the manufacture of the floss. The Magistrate acquitted the accused.[28] On appeal against the acquittal, Yusoff Mohammed J. dismissing the appeal observed:

> The learned Magistrate has found as a fact that the respondent had taken all reasonable steps in ascertaining that the manufacture of the fish floss did not contain mercury as found after analysis. This was a home industry manufacturing the floss on a small scale for distribution locally. The learned Magistrate also found that the respondent did not act wilfully and that it was not reasonable to impose on a small scale industrialist as the respondent the obligation to employ a chemist to analyse the food she produced before marketing them".[29]

The judgment is a sound one. However, the finding that the statute was not one of strict liability because it indicated a defence in section 21 was unnecessary. It would have been sounder to have proceeded on the basis that absence of negligence is a defence to the strict liability offence created by the statute. The judgment is useful in that indicates that in assessing negligence factors such as the nature of the operations run by the Accused should be taken into account. But this sympathy for the small businessman may be achieved at the cost of the protection

24 *Studies in Strict Liability.*
25 [1978] 2 M.L.J. 38.
26 At p. 40.
27 [1982] 1 M.L.J. 302.
28 Section 21 of the Ordinance provided a defence: ". . .it shall be no defence that that the defendant did not act wilfully unless he also proves that he took all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance".
29 The imposition of such an obligation is counterproductive. As Kadish found, the costs would be transferred by the manufacturer to the consumer.

of the consumer. The area gives great scope for analysis of social and economic costs and benefits of any particular decision.

These cases indicate that in, at least, a certain category of strict liability offences which specify conditional factors, mistake of fact and absence negligence will provide defences to liability in Singapore and Malaysia.

(2) *Status and Absence of Knowledge as to Status*

Some statutes creating strict liability offences impose a status upon an individual and then require him to perform a duty or meet certain standards regarding activity related to that status. The best example of such a situation in Singapore is provided by *Lim Chin Aik.*[30] The statute and the regulations made under it imposed on the accused the status of a prohibited immigrant. The duty attendant upon that status was that he should leave Singapore. A rationale of *Lim Chin Aik* is that because the accused was not aware of the imposition of such a status and the nature of the duty attendant upon it, he is not liable for the offence of staying on in Singapore while being a prohibited immigrant. The case, then, may be construed as authority for the proposition that where the strict liability offence depends upon status and the performance of a duty flowing from such a status, then ignorance as to such status or duty[31] may provide a defence.

Similar analysis could be made of cases involving licenses and permits. Holders of licenses have a status and are permitted to do certain things and required not to do others. The requirement to avoid certain conduct is often enforced by the creation of a strict liability offence. Mistake as to the status or the nature of the duty will provide a defence.[32] In the large majority of instances, because the accused himself applies for the permit or the license, he would be credited with knowledge of his status and of the obligations flowing from it. But, *Lee Ah Kow* shows that this may not always be the case.[33] Here, the accused was charged with having violated the customs (Prohibition of Imports) Order, 1978, in having imported cars into Johore Bahru from Singapore without an "approved" (sic) permit. The accused had the permits but they were proved to be forgeries. The Customs Act provided for a defence if the accused could show that the goods were lawfully imported. The court held that it was possible for the accused to escape conviction by showing that he did not know that the permit he had to import the cars was defective. The lack of knowledge on reasonable grounds of absence of authority to lawfully import the goods will provide a defence. The conclusion is supported by dicta in the judgment of the Federal Court of Malaysia in *Koo Cheh Yew.*[34] The case involved the importation of pianos

30 [1967] A.C. 160.

31 The author does not wish to press ignorance as to the duty as a defence. Knowledge of the status may be sufficient as it leads to the inference of knowledge of the attendant duty, unless there had been some reasonable mistake of fact as to the duty.

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

33 [1982] Malaysian Current Law Journal 561.

34 [1980] 2 M.LJ. 235. Dicta in some older Malaysian cases may allow a plea based on negligence; se *Chong Kwong* [1935] M.L.J. 41; *Goonetilleke* [1936] M.LJ. 47. These cases considered the possibility of a defence under s. 79 of the Penal Code.

from South Africa. Regulations under the Customs Act prohibited the import of goods from South Africa. The accused's defence was one of ignorance of the prohibition. The court rejected the defence but explained that in circumstances in which absence of knowledge amounts to a mistake of fact it may provide a defence. The Court explained:

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

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

Where mistake of fact or absence of negligence is pleaded, evidence establishing the defence on a balance of probabilities can be produced by the defence. This has been the view taken in Australia and Canada.[35] The justification for it was on the basis that strict liability statutes are intended to lessen the burden of proof that the prosecution has to satisfy. It was on this basis that reservations were expressed towards the acceptance of the Australian solution in England. It was argued that the decision of the House of Lords in *Woolmington* had established that in a criminal case, the burden of proof, including the burden to show that a defence pleaded by the accused (except insanity) was on the prosecution. This basic principle would be flouted, if the Australian solution was accepted and the accused was required to prove his defence.[36] Whatever merit there may be in this argument, it has no application as far as Singapore and Malaysia are concerned. The burden of proof in criminal cases in these states stated in s. 107 of the Evidence Act. According to that provision and the cases that have interpreted it,[37] the accused has to establish on a balance of probabilities, any defence he pleads. The scope for the Australian solution of a half way house between strict liability and liability based on *mens rea* in Singapore and Malaysia is great.

D. Statutory Defences relating to Possession

There are two broad areas in which mere possession of substances would attract liability for strict liability offences in Singapore and Malaysia. They relate to possession of drugs and the possession of firearms and explosives. Though statutory offences relating to these

35 For Australian, see *Proudman* v. *Dayman* (1941) 67 C.L.R. 536; for Canada, see *City of Sault Ste. Marie* (1978) 40 C.C.C. (2d) 353; for New Zealand see *MacKenzie* v. *Civil Aviation Department* (1984) 8 Cr. L.J. 54.
36 *Sweet* v. *Parsley* [1970] A.C. 132 at p. 164.
37 *Jayasena* [1970] A.C. 617.

areas exist in other Commonwealth jurisdictions, punishment that could be imposed for these offences in Singapore and Malaysia are severe.[38] The notion of possession itself may disclose the existence of defences to liability for such offences.[39] As a jurisprudential proposition, possession itself involves a mental element. In law, possession involves physical control over a thing with an *animus possidendi.* On that basis one cannot possess a thing if one is not aware of the fact that he has control over it. Hence, a person who is not aware that he has control over a thing should have, in theory, a defence to an offence based on possession. But the law has developed in a fashion that does not give much scope for such a defence. Because of statutory differences, it is best to consider drugs possession and firearms possession separately.

(1) *Possession of drugs*

In Singapore, s. 6 of the Misuse of Drugs Act makes the possession *per se* of drugs an offence. A distinction is drawn in the legislation between possession *per se* and possession of a container having the drug.[40] Possession of a container having the drug is specifically provided for in s. 16 which creates a presumption that the person having control of the container has knowledge of its contents. It is left to the accused to rebut the presumption. The making of this distinction itself indicates that possession *per se* is an offence and that arguments based on the concept of an *animus possidendi* are excluded. Where drugs are found on the person of the accused, it would appear that there is an absolute presumption that he was aware of their presence. Otherwise, there would have been no need to state a presumption in cases involving containers.

Evidently, the need for s. 16 was the House of Lords decision in *Warner* v. *Metropolitan Police Commissioner*[41] where it was accepted that a person may possess a box but not its contents. Some, including Lord Guest who dissented in that case, thought that the ruling created "a drug pedlar's charter". S. 16 is intended to counteract the effect of *Warner* by creating a presumption of knowledge of the contents of

38 In Malaysia, possession of firearms may lead to a sentence of life imprisonment under the Firearms (Increased Penalties) (Amendment) Act, 1974; for sentencing criteria under the act, see *Che Ani bin Itam* [1984] 1 M.L.I. 113; it may lead to a sentence of death under the Internal Security Act, 1960; for sentencing criteria under the Act, see *Lau Kee Hoo* [1984] 1 M.L.I. 110; *Sum Kum Seng* [1981] 1 M.L.I, 244. In Singapore, possession of firearms carries a mandatory minimum sentence of five years imprisonment; Arms Offences Act, 1984. The first prosecution under the Act was reported in the Singapore Monitor, 31.10.84.
Stringent measures including capital punishment have been introduced for drug offences. For Malaysia, see Dangerous Drugs (Amendment) Act, 1983; on it see *Mohamed Ismail* [1984] 1 M.L.I. 134.

39 This approach has been widely adopted in Australia since *Williams* (1978) 22 A.L.R. 195; but for the earlier approach, see *Bush* (1975) S.A.L.R. 387; for an analysis of possession in relation to drug offences, see A.L. Goodhart, "Possession of Drugs and Absolute Liability" (1968) 84 L.Q.R. 382. Also see *Tan Ah Tee* [1980] 1 M.L.I. 49.

40 This analysis is supported by the judgment of Wee Chong Jin C.I. in *Seow Koon Guan* [1978] 2 M.L.I. 45; also see *Syed Ali bin Syed Abdul Hamid* [1982] 1 M.L.I. 132. On possession under the Customs Act, see *Kedah and Perlis Ferry Service Sdn. Bhd.* [1978] 2 M.L.I. 221; *Lee Wye Keng* [1978] 1 M.L.I. 38. On trafficking in drugs and possession see S. Yeo, "Drug Trafficking Offences in England, Canada and Singapore" (1982-83) 2 Lawasia (N.S.) 220; S. Yeo, "The 'Transporting' Drug Trafficker: Dictionary or Legal Sense" (1981) 23 Mal. L.R. 275.

41 [1969] 2 A.C. 256.

the container. But this creates a problem, for the creation of the presumption involves an acceptance of the fact that knowledge of the nature of the substance in the container is essential for conviction. If that be so, absence of knowledge of the nature of the substance should be a defence both to possession *per se* as well as possession in containers.[42] It must follow that since knowledge of control of the substance is an essential precondition for the knowledge of the nature of the substance, absence of knowledge of control should provide a defence in cases of possession *per se.* These are logical inferences and they are inconsistent with the objectives the draftsman of the legislation intended to achieve. The legislation, by responding to an English decision, has introduced into the law all the uncertainties and inconsistencies of the English law in this area.[43] The scope of absence of knowledge of control or of the nature of the substance as a defence has yet to be worked out satisfactorily in any Commonwealth jurisdiction. The general tendency in Singapore and Malaysia, however, favours the view that possession *per se* of drugs is an offence of strict liability.[44] But, in cases of constructive possession, there has been unwillingness to convict in the absence of proof of knowledge of possession.[45] S. 16, however, requires that absence of knowledge is to be established by the accused.

(2) *Possession of firearms and explosives*

Possession of firearms and explosives may present similar problems but, having regard to the size of the object and its obvious nature, innocent possession of it could seldom be established. Mistake of fact, may, however, be relevant in certain circumstances. In *Howell,*[46] an English case, where the accused was in possession of an antique gun and was charged with the possession of a firearm without a license, conviction was upheld on the basis that the offence was one of strict liability. The possibility of a defence of mistake of fact on the basis that the antique gun was only a collector's piece rather than a firearm was not considered.[47] In Malaysia, early decisions have regarded the offence as one of strict liability.[48] Yet, *Sambasivam*[49] clearly contemplated the possibility of duress being a defence to the charge but this is on a theory of the defences in the Penal Code which has not since been accepted.[50]

In the case of possession of hand grenades, a strict interpretation of the statute has been adopted in Malaysia. In *Leong Kuai Hong,*[51] Lord President Suffian held that hand grenades devoid of explosive

42 Smith and Hogan, *Criminal Law, op.cit.* p. 94.
43 In Canada, possession of drugs unaccompanied by knowledge of possession is not an offence. *Beaver* (1957) 118 C.C.C. 129; but possession of undersized lobster not knowing it was undersized has been held to be an offence. *Pierce Fisheries* [1971] S.C.R. 5. For Australia, see *Munno* v. *Lombardo* [1964] W.A.R. 63.
44 *Tan Yong Sin* [1939] M.L.J. 86; *Tan Hoay* [1938] M.L.J. 216 but see *On Ah Huat* (1878) 3 Ky. 100.
45 *Ho Seng Seng* [1952] M.L.J. 225; *Tan Peng Heng* [1953] M.L.J. xxv. These cases are under the old Act. Also see *Tan Ah Tee* [1980] 1 M.L.J. 49.
46 [1982] Q.B. 416.
47 This may border on being a mistake of law rather than one of fact.
48 *Sulong bin Nain* [1947] M.L.J. 138; *Toh Ah Loh* [1949] M.L.J. 227.
49 [1956] M.L.J. 220.
50 See discussion above pp. 24-25.
51 [1981] 1 M.L.J. 246.

substances did not come within the definition of ammunition under the Act and that persons possessing such grenades will not be guilty. This decision makes a reasonable mistake of fact that the grenade did not contain explosives a defence to a charge involving the possession of grenades.

CONCLUSION

Courts in Singapore and Malaysia are beginning to accept defences to strict liability offences. This process will be facilitated if it is accepted that strict liability offences are autonomous and constitute a second track of the criminal law of the two states. These offences came into the scene long after the Penal Code was drafted and are based on theoretical foundations which cannot be accommodated within the Code. Besides, courts in these countries have relied on Commonwealth precedents for deciding whether a statute should be construed to be one of strict liability or not. It is, therefore, logical that trends which are emerging in other Commonwealth jurisdictions are looked at and if they accord with justice and are consistent with local policy objectives and local conditions, be accepted as forming a part of the law of Singapore and Malaysia. On this basis, this paper sought to establish that certain defences to criminal liability are available in Singapore and Malaysia. On this basis, this paper sought to establish that certain defences to criminal liability are available in Singapore and Malaysia.

M. SORNARAJAH *

* LL-B. (Ceylon), LL.M. (Yale), LL.M., Ph.D. (London), Visiting Senior Fellow, Faculty of Law, National University of Singapore.