

II. The Basis of Sanctions: The Concept of Liability

Every crime must have a clear legislative basis.

The legislature has used two types of techniques for creating an offence. In the first technique no act or omission can be a crime unless it is declared so by a statute, ordinance, rule or regulation adopted by a legislative or statutory authority. In the second, a penalty is attached for the non-compliance of a normative behaviour without declaring it a crime under a statute, rule or regulation. Therefore a crime may take the form of failure to perform a required action, rather than the doing of a prohibited act. At this juncture a distinction is required to be made between a crime and a civil wrong, for not all illegal acts nor all civil wrongs are crimes. Most conveniently, and in a statutory sense, a crime may be defined as an act that is capable of being followed by criminal proceedings having the one of the types of outcome (punishment - imprisonment, fine etc.) known to follow those proceedings. Similarly a civil wrong may be defined as an act which is capable of being followed by civil proceedings having one of the types of outcome (damages, compensation etc.) known to follow those proceedings.

The basis for imposing sanctions for the non-observance or violation of an act lies in the responsibility requirement

which is inherent in the prohibited act itself. In other words the person who has acted or omitted to act is penalized because he is made responsible and consequently liable for his act or omission under some statute, rule or regulation. In this sense liability may be defined as the state of one who is bound in law to do something which may be enforced by action. The liability may arise from some statutory obligation, from contract-express or implied or in consequences of a tort committed. The power to determine what acts shall constitute crimes and what acts shall not exclusively vests in the legislature. The legislature, however, has no power to pronounce the performance of an innocent act criminal where the public health, safety, or public welfare is not interfered with. Not only this, in declaring an act criminal, the statute must have some substantial relation with the ends sought to be accomplished by such declaration/prohibition.

In order that a person is not unjustly convicted or prosecuted, the law relies heavily on the mental state of the accused person. However under certain special circumstances modifications have been permitted in the requirement of mens rea. The first of these special circumstances is where a person is convicted without the existence of any mens rea. This is usually done in the case of public welfare offences. The second is where a person is liable for the acts of others. Accordingly following three

types of liabilities exist in criminal law in general and water in particular which form the basis for imposing sanctions under any statute, rule or regulation:

- (i) fault liability or liability based on fault,
- (ii) strict liability, and
- (iii) vicarious liability

(i) Fault Liability:

Mens rea is the basis for imposing fault liability. As a general rule legal consequences of an act or omission depend on the mens rea. However the law does not concern itself with mere guilty intention. Mens rea must be preceded by some overt act or outward manifestation. In other words the intent and the act together constitute the crime. Though the seriousness or the gravity of the penalty depends on the seriousness of the offence, it is more or less affected by the intention or the state of mind with which the offence was committed. This is because liability in criminal law is based on the maxim "Actus non facit reum nisi mens sit rea" i.e. the act does not make a man guilty unless he is of a guilty mind. That is why the definition of an offence includes not only an act or omission and its consequence but also the accompanying mental state of the actor. In this connection Goddard, J. has aptly remarked that -

It is of the utmost importance for the protection of the liberty of the subject that the court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a <sup>12</sup> guilty mind.

Though in the absence of intention a person is not generally liable in criminal law, an action may lie against him in a civil action. The reason for this is that for the purpose of civil liability it does not matter whether the action was deliberate or merely accidental. This is because of the fact that the object of civil law is not to punish or reform the wrongdoer but to compensate a person for the loss he had suffered. On the contrary in criminal law generally liability rests on *mens rea*.

For the imposition of any sanction both *mens-rea* and *actus reus* must be present. According to Turner, "*actus reus* is a result, forbidden by law and produced by human conduct. When this has been proved it usually raises the presumption of the existence of an adequate *mens rea*, but it is permissible to prove by other means than by the <sup>13</sup> presumption so created by the facts of the *actus reus*". Intention is the commonest type of *mens rea*. It denotes the state of mind of the man who not only foresees, but also <sup>14</sup> desires the possible consequences of his conduct. Intention

may be said to be the mental state of the actor and intention is usually the objective to which conduct of the actor is directed.<sup>15</sup> To find out the intention of the accused is, however, not an easy task, for intention is a state of mind and can only be inferred from the facts which are proved.<sup>16</sup>

The mens rea may be inferred from the intention of the accused or from his knowledge of the likelihood of the consequences of his act. The Indian Penal Code, 1860, does not define the word intentionally. It defines its lessor analogue voluntarily. Section 39 states that a person is said to cause an effect voluntarily when it causes it by means whereby he intended to cause it or by means which, at the time of employing those means, he knew or has reason to believe to be likely to cause it. Thus the term has been defined with reference to the causation of its effects. It is presumed that every adult of sane mind intend the consequences which directly follow from his conduct.<sup>17</sup> In this way voluntary is opposite of accident or to an act performed under duress or coercion.

In the Indian Penal Code, 1860, in the definition of an offence the requirement of knowledge<sup>18</sup> is denoted by the words 'dishonestly',<sup>19</sup> 'fraudulently',<sup>20</sup> 'reason to believe',<sup>21</sup> which have been defined in the IPC. However in some sections of the IPC the words 'knowingly',<sup>22</sup> 'negligently',<sup>23</sup> 'rash or negligent',<sup>24</sup> 'intending',<sup>25</sup> or knowing it to be likely'<sup>26</sup> 'likely to cause',<sup>27</sup> intending to take 'dishonestly'<sup>28</sup> and intend to cause or knowing that he is likely to cause'<sup>29</sup> etc. have also been used.

(ii) Strict Liability

The strict liability is based upon the absence of mens rea and the accused is punished for his own actus reus. The application of the doctrine of strict liability in criminal law reflects the rise of industrialization, and its application was invoked first of all in public welfare offences. In R v. Prince<sup>30</sup> it was held that there could be criminal liability without the necessity of mens rea, depending on the proper interpretation of statute creating the offence. A more explicit reasoning for the existence of the doctrine of strict liability was given in English case of Parker v. Alder.<sup>31</sup> In this case the defendant was convicted of selling adulterated milk, although he had delivered the milk in a pure and unadulterated condition to the railway company which was the carrier. The adulteration took place during transit without the defendant's knowledge or consent. Lord Russel held the defendant liable and said:

"Now assuming that respondent was entirely innocent morally, and had no means of protecting himself from the adulteration of this milk in the course of transit, had he committed the offence under the Act? I think that he has. When the scope and objects of these Acts are considered, it will appear that if he were to be relieved from responsibility, a wide door would be opened for evading the beneficial provisions of this legislation."

however also

The courts ruled out mens rea in public welfare offences. Giving the rationale for doing so the judicial committee of the Privy Council held in Lim Chin Aik v.  
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R. that

"where the subject matter of the statute is the regulation for the public welfare of a particular activity - statutes regulating the sale of food and drink are to be found among the earliest examples... It can be frequently inferred that the legislature intended such activities to be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that such statutes are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea... But it is not enough in their Lordship's opinion merely to label the statute as one dealing with a grave social evil and from that to infer that the strict liability was intended.

It is pertinent also to inquire whether putting the defendant under strict liability will assist in the regulations. That means that there must be something

he can do, directly, or indirectly, by supervision or inspection, by improvements of his business methods or by exhorting those whom he may be expected to influence or control which will promote the observance of the

regulations. Unless this is so, there is no reason in penalising him, and it can not be inferred that the legislature imposed strict liability merely in order to find a luckless victim.

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Since, as Sayre has observed, "all criminal law is a compromise between two fundamental conflicting interests, - that of the public which demands restraints of all those who injure other's social well being and that of the individual who demand maximum liberty and freedom from interference", the following grounds have been given for recognising offences of strict liability.

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- (a) difficulty in proving mens rea in certain offences.
- (b) for protecting wide social interests reflected in a statute.
- (c) usually because of the absence of mens rea in the offences of strict liability, light punishment in the form of fine is prescribed

The strict liability offences include offences which may not necessarily be criminal but which are prohibited by the levy of a penalty in public interest. In case of such offences, though the proceedings are criminal in form, they are summary modes of enforcing civil rights.

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In such cases, the prosecution need only prove the prohibited act and the defendant must then bring himself within a statutory defence.

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Many statutes have been passed since the enactment of the Indian Penal Code, 1860, and have created new offences not previously provided under the IPC. Some of the statutes, more particularly those dealing with environment, or regulatory in nature, or public welfare statutes have created offences of strict liability.

(iii) Vicarious Liability.

Vicarious Liability is basically a concept of civil law. Criminal liability can never be vicarious except under certain statutory provisions. In civil law the vicarious liability arises in two situations. First, a master is liable not only for his own acts but also for the wrongs done in the course of employment. It is based on the maxim *quifacit per alium facit per se*,<sup>38</sup> and *Respondent superior*.<sup>39</sup> The second situation is where the legal representatives of dead persons are made responsible for the acts of their predecessors. This is in contradistinction with the maxim *Actus personalis moritur cum persona*.<sup>40</sup>

However, the application of vicarious liability in criminal law was not favoured by English Jurists.<sup>41</sup> In vicarious liability the mens rea and actus reus of another person is imputed to the accused, and it is for this that he is punished. Thus the principle of vicarious liability is contrary to the general principle of criminal law that a person who immediately does the act or permits it to be done is criminally punishable. In common law vicarious liability was imposed only in exceptional cases of public nuisance, defamatory libel

and contempt of court etc. The rationale of vicari us  
liability was enunciated in R.V. Medley,<sup>42</sup> where the chairman,  
his deputy and other directors of a company were discharging  
into a river some deleterious substances so that water became  
polluted and unfit for human consumption. The court held the  
accused persons liable for causing nuisance and held:

"It is said that the director were ignorant of  
what had been done. In my judgement that makes  
no difference.... It seems to both common sense and  
law, that, if persons for their own advantage employ  
servants to conduct works, they must be answerable  
for what is done by those servants."<sup>43</sup>

Similarly, in R.V. Stephens,<sup>44</sup> the accused, an old person,  
stacked rubbish near the edge of a river, floods carried away  
the rubbish to the river which obstructed navigation. The  
court held that though the accused was an old person and the  
works were managed by his son, the accused is guilty of causing  
public nuisance even though this had been caused without  
his knowledge and contrary to his general orders.

The same position prevails in India where the vicarious  
liability is confined more to public welfare offences. In  
water law the examples of this type of liability are found in  
special statutes such as Irrigation Act, Environment  
Protection Act, Factories Act and Water Pollution Act etc.