Pape J. went on to consider the test of materiality. Traditionally, materiality has been approached either from the viewpoint of the reasonable proponent[16] or, more commonly, in terms of the prudent insurer.[17] His Honour preferred the latter view, again on the authority of *Mutual Life Insurance Co. of New York v. Ontario Metal Products Company Ltd.*[18]

The preference of Pape J. is very likely a proper one. There are doubtless many real factors which, while they may appear relatively unimportant even to a reasonable proponent, are well understood by insurers to be highly relevant to an evaluation of the risk.

To establish materiality the defendant relied upon its own practice of declining to insure probationary licence holders. Evidence to this effect was held to be admissible despite earlier authority to the contrary.[19]

The defendant's only witness was an officer of the company. Pape J. held that he could have given evidence of *general* insurance practice, if qualified to do so, but the witness had expressly disclaimed knowledge of such practice. While the evidence showed that the *defendant* did not consider the matter immaterial this did not, in the view of Pape J., go to establish materiality in terms of the 'prudent insurer'.

The defendant runs the risk of non-persuasion of materiality. Some matters will be obviously material (or immaterial) so that the tribunal of fact will need no evidence of that fact. But where the matter is one of 'novelty or doubt', expert evidence may be the only means of overcoming the burden of proof.

Under these circumstances, it was held that the defendant had not established materiality. No statistical evidence had been adduced to show that probationary licence holders were more accident prone than other licensed drivers. Since licences are given only after testing, a certain level of driving proficiency must have been reached by the holder. Moreover, Pape J. felt that the prudent insurer would not refuse to indemnify probationary licence holders in view of the continuity which is common in insurance relationships, even though policies run on a year-to-year basis. Most companies, he felt, would insure newly-licensed drivers in the expectation of further custom after the probationary period expired.

SIMON WYNN

HANDMER v. TAYLOR[1]

Criminal law—Statutory offence—Mens rea

Mens rea is normally an essential ingredient of a criminal offence, so that if the defendant asserts a mistake he is only denying guilty intent.

[16] *E.g. Guardian Assurance Co. Ltd v. Condogianis* (1919) 26 C.L.R. 231, 246-7 *per* Isaacs J.: '[the assured's] duty was to disclose such material facts as a reasonable man in his position would have considered material'.

[17] See *MacGillivray on Insurance Law* (5th ed. 1961) i. 402.

[18] [1925] A.C. 344.

[19] The cases seem to be founded on the case of *Carter v. Boehm* (1766) 3 Burr. 1905; 97 E.R. 1162. However, an examination of the judgment reveals that it was not expert evidence as such that was held inadmissible, but the particular testimony given in the case which was, in the view of Lord Mansfield 'mere opinion, which was not evidence. It is opinion after an event'. The modern practice is to admit expert evidence: *e.g. Yorke v. Yorkshire Insurance Co. Ltd* [1918] 1 K.B. 662; *Horne v. Poland* [1922] 2 K.B. 364; *Glicksman v. Lancashire & General Assurance Co. Ltd* [1925] 2 K.B. 593; *Arnould on Marine Insurance* (15th ed. 1961) ii. 547.

[1] [1971] V.R. 308. Supreme Court of Victoria; McInerney J.

However, two qualifications of this proposition need to be made in relation to minor regulatory offences. First, it is sometimes the case that *mens rea* is not a requirement of the offence at all, so that any mistake by the defendant is not relevant. Secondly, however, it is sometimes the case that even though *mens rea* is not an ingredient of the offence, a reasonable mistake of fact by the defendant is a defence. One of the uncertainties involved in this defence has been whether it is an independent requirement of the law that the defendant's mistake be reasonable. *Handmer v. Taylor*[2] provides much needed guidance on this point.

In this case, the defendant was charged with felling timber in a protected forest without a permit. He gave evidence that he believed that the area in which the trees were cut was outside the Crown land. In fact, the trees were felled within this area.

On review, McInerney J. held that, unless excluded by the statute, it is a defence to a statutory offence that the defendant held an honest belief in facts which, if true, would make the act innocent, provided further that as a matter of law there must be objectively reasonable grounds for such belief.

In His Honour's opinion, reasonableness should not be a separate requirement of the defence; rather it should be an additional factor in deciding whether the defendant's mistake was an honest one. However, McInerney J. felt obliged to set his own opinion aside because[3]

> the requirement that the belief must be shown to be founded of reasonable grounds has been laid down in many decisions which must be accepted as authoritative in this Court . . . .

The proposition that the defendant's mistaken belief must not only be an honest one, but must be objectively reasonable as well, leads to at least two results which are not altogether satisfactory. First, as Barry J. observed in *R. v. Bonnor*,[4]

> The insistence that the accused person should have had reasonable grounds for his mistaken factual belief means, of course, that he may be criminally liable, and thus punishable, although he honestly believed his conduct was innocent.

Second, it is to be noted that such a rule is inconsistent with the general criminal law, for in more serious offences such as rape, a mistaken belief whether reasonable or not is a defence.[5] In minor offences this is now not necessarily so.

The question whether any particular area of land is Crown land was held to be a question of fact. For this proposition, McInerney J. relied on *Thomas v. R.*[6] and *Tannella v. French*.[7] In *Thomas's* case the defendant had married a woman who had been previously married but whose first marriage had been dissolved. Later he purported to marry another woman, this being the ceremony the subject of the charge. His defence was that at the time of the second ceremony he believed himself to be unmarried because he believed his supposed wife never to have been divorced from her first

[2] *Ibid.*
[3] *Ibid.* 313.
[4] [1957] V.R. 227, 252; [1957] A.L.R. 187, 213.
[5] Bigamy is the only clear exception.
[6] (1937) 59 C.L.R. 279; [1938] A.L.R. 37.
[7] (1968) 119 C.L.R. 84.

husband. The basis of this mistaken belief was the further belief that the entry in the court records necessary to convert a decree *nisi* into a decree absolute had never been made. All the members of the High Court held that this was a mistake of fact. In *Tannella v. French*,[8] the defendant was convicted of 'wilfully demanding or wilfully recovering' as rent an irrecoverable sum. In that case, there was a division of opinion as to whether the mistake in question was one of fact or of law.

In the present case, it could well be said that the mistaken belief was one which combined both fact and law, but this was not considered in the judgment.

The authority in this area of mistake of fact or of law is not clear, but the generally accepted view is that held by Dixon J. in *Thomas v. R.*:[9]

> But, in any case, in this distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law.

The case of *Gherashe v. Boase*,[10] which was similar on the facts, was not directly referred to by McInerney J. He said simply that the magistrate's decision in the case before him was apparently based on it. He did not discuss at all the proposition advanced by Dean J. in *Gherashe v. Boase*,[11] that the defendant's defence would not succeed unless he could show that he actually addressed his mind to the question about which he was mistaken; in other words, that mere ignorance, as opposed to mistake, is not enough. The reason, no doubt, is that in the present case the defendant evidently had directed his mind to the question of the extent of the Crown land, although he had not pursued his inquiries far enough.

LOUISE CLAYTON

PITFIELD AND OTHERS v. FRANKI AND OTHERS[1]

Industrial law (Cth)—Registration of organizations—Concept of industry

To be registered as an organization under the Conciliation and Arbitration Commission, a union must comply, *inter alia*, with the provisions of section 132 of the Conciliation and Arbitration Act 1904-1970 (Cth).[2]

In September 1964, the United Firefighters Union applied for registration under the Act. After an amendment to its rules, and despite objections from the firefighting authorities, the Union was registered. The decision to register the Union was confirmed by Franki J. in the Commission. In the High Court, the authorities appeared against these decisions. The appeal succeeded on the ground that the Union did not comply with the provisions of section 132.

[8] *Ibid.*
[9] (1937) 59 C.L.R. 279, 306; [1938] A.L.R. 37, 47. *Cf. Bergin v. Stack* (1953) 88 C.L.R. 248; [1953] A.L.R. 805.
[10] [1959] V.R. 1; [1959] A.L.R. 218.
[11] *Ibid.*
[1] (1970) 44 A.L.J.R. 391. High Court of Australia; Barwick C.J., McTiernan, Menzies, Owen and Walsh JJ. The case has been noted elsewhere: see (1971) 45 *Australian Law Journal* 36; (1971) 45 *Australian Law Journal* 148; generally on the concept of 'industry'. Further, see (1971) 45 *Australian Law Journal* 34 on the granting of prerogative writs in this case.
[2] Referred to *infra* as 'the Act'.