STRICT RESPONSIBILITY IN WESTERN AUSTRALIA.

In this article it is proposed to discuss the principles to be applied when the prosecution seeks to establish strict or vicarious responsibility against a defendant charged with an offence against a statute other than the Criminal Code. The discussion will be conducted in four parts. First, terms will be defined and a general theoretical analysis undertaken. Second and third, the case law of Western Australia relevant to strict and vicarious responsibility respectively will be examined. Finally, the unspectacular conclusion will be reached that no certain inference can be drawn as to the present state of the law because the courts have failed to address themselves to the problems involved.[1]

(i) *The Principles.*

By section 36 of the Criminal Code of Western Australia the provisions of chapter V of the Code apply to "all persons charged with any offence against the Statute Law of Western Australia"; and by section 2 of the Criminal Code Act 1913, the Code "shall be the law of Western Australia with respect to the several matters therein dealt with." Chapter V of the Code contains the general principles of criminal responsibility. The effect of these provisions is twofold. First, the general principles of criminal responsibility are to be found in chapter V of the Code and nowhere else.[2] Second, these principles protect not only a defendant charged with an offence against a section of the Code itself, but also a defendant charged with an offence, however minor, against any other statute of Western Australia.

The terms "strict responsibility" and "vicarious responsibility" are used hereinafter in the following senses. Strict responsibility means liability to conviction without proof of fault, that is to say, without proof by the prosecution of intention, recklessness, or negligence on the part of the defendant. Vicarious responsibility refers to a particular form of strict responsibility, namely, liability to conviction for the act of another without proof by the prosecution of intention, recklessness, or negligence on the part of the defendant with reference to the

1 The position in Queensland, where exactly the same questions arise, but where the effect of the case law has been very different, is set forth by the present writer in a forthcoming article in the MODERN LAW REVIEW.

2 Thus the common law doctrines of *mens rea* and strict and vicarious responsibility are irrelevant in Western Australia.

relevant act of that other person. It will be convenient to confine the term "strict responsibility" to liability to conviction for one's own act and to refer to liability to conviction for the act of another as "vicarious responsibility" in the sense just indicated.

Chapter V of the Criminal Code includes sections 23 and 24, which, so far as relevant here, run as follows:

Section 23: "Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."

Section 24: "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

"The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

It does not require much thought to see that where either of these sections applies there cannot be a conviction on the basis of either strict or vicarious responsibility. Section 23 excludes responsibility for an act which occurs independently of the exercise of the will. Now "act" here must mean an act for which the actor is prima facie criminally responsible. This is best illustrated by an example. Suppose D.[3] is charged with selling sub-standard milk contrary to a statute regulating the production and sale of milk. D. says that he did not know that the milk was sub-standard and that therefore the act with which he is charged occurred independently of the exercise of his will in one material particular. P. replies that the act of selling did not occur independently of the exercise of his will, and that since the milk turned out to be sub-standard he should be convicted. Although there is no definition of "act" in the Code, it is submitted that P.'s argument is wrong. D. is not charged with selling milk. He is charged with selling sub-standard milk. In other words, the criminal act with which he is charged includes knowledge that the milk is sub-standard, or at least knowledge of the likelihood of the milk's being sub-standard, and if P. fails to prove knowledge of this element on D.'s part he has failed to prove a volitional criminal act.

[3] D. stands for the defendant to a criminal charge and P. for the prosecutor.

Now, suppose that D. is an employer charged with the same offence, "selling" sub-standard milk, the only variation in the facts being that the sale relied upon by P. was in fact made by one of D.'s roundsmen. By parity of reasoning section 23 precludes conviction unless P. proves not only knowledge by D. of the state of the milk, but also at least advertence on his part to the likelihood of a sale by his employee. If section 23 applies there is no room for a rule that the roundsman's act is to be treated as D.'s act unless it is proved that the roundsman acted in accordance with D.'s will.

The effect of applying section 24 instead of section 23 is to widen the scope of liability to include negligence on D.'s part, but not to allow strict or vicarious responsibility. At first sight sections 23 and 24 might seem to be inconsistent. According to section 23, D. is not criminally responsible for an act which occurs independently of the exercise of his will, yet under section 24, if he argues that the criminal act in question was non-volitional owing to a mistake which prevented knowledge of a material fact, D. is still liable if the error was not a reasonable one to make in the circumstances. Put more shortly, section 23 prevents liability for negligence, whereas section 24 permits it. The solution is to be found in the opening words of section 23: "Subject to the express provisions of this Code relating to negligent acts and omissions . . ." Section 24 is such an express provision, for an unreasonable mistake is one which a reasonable man would not have made in the circumstances, a negligent mistake. At this point attention must be drawn to the distinction between mere absence of knowledge, or simple ignorance, and a positively wrong belief, or mistake. Where the defendant pleads simple ignorance he is relying on section 23, for he is asserting that the culpable act occurred independently of the exercise of his will. Where he pleads mistake of fact he is relying on section 24, for he is precluded from relying on section 23 even though he is once again asserting that the criminal act occurred independently of the exercise of his will. He is precluded because the opening words of section 23 have the effect of referring a plea of mistake of fact, as opposed to simple ignorance, for consideration under section 24; but section 24 says that a negligent mistake is no defence.

Since there is this difference in the incidence of liability for minor statutory offences according as the defendant relies on section 23 or section 24, it becomes important correctly to classify a plea of "I did not know." This need not present much difficulty. The typical case in which section 23 rather than section 24 is in issue is unlawful possession. Suppose D. is charged with the unlawful possession of

gold. If his answer is that he did not know of the presence of the gold among his belongings, he is setting up section 23, and it would be of no avail for P. to prove that he ought to have known. But if D. says that he knew of the presence of the object produced by P. among his belongings and thought it was a worthless lump of rock, he is setting up section 24, and it becomes relevant to inquire whether this belief was reasonable in the circumstances.

Another example of a section 23 situation is furnished by the celebrated English case of *Larsonneur*.[4] D. was a woman of French nationality who had entered England lawfully but had subsequently been ordered to leave the country again. She obeyed this order by going to Eire, where she proved to be equally unwelcome. She was arrested and handed back to the English police, who thereupon, and without letting her out of their custody, successfully prosecuted D. for being an alien "found" in England without permission. If these events had occurred in Western Australia, D. would have been able to rely on section 23 of the Code, for she was in the forbidden territory independently of the exercise of her will.

Nevertheless, it is normally section 24 which will be relied on where D. is charged with responsibility for his own act, as opposed to the act of another. Thus, in the first example above D. is not asserting that he was ignorant of the presence of the substance in the milk which caused it to be below standard; he is asserting a positive, although wrong, belief that the milk was up to standard. Accordingly, if the court concludes that he was negligent in holding this belief, he should be convicted. On the other hand it should be observed that it would not be appropriate to apply section 24 to an offence of "knowingly" or "wilfully" doing something, for these words (or any synonym for them) imply a requirement of positive knowledge by D. of all the facts constituting the offence, and such a requirement is inconsistent with liability for negligence only. Thus if D. in reply to a charge of "knowingly" selling sub-standard milk says that he mistakenly supposed the milk to be up to standard, the only question is whether he in fact held this belief, and not in addition whether it was a reasonable belief to hold; for the effect of the word "knowingly" is impliedly to exclude liability for negligence, and therefore section 24, and to leave D.'s responsibility to be determined by the rule as to volition in section 23. This is no doubt the point of the concluding words of section 24: "The operation of this rule may be excluded by the express or implied

[4] (1933) 97 J.P. 206.

provisions of the law relating to the subject." Both section 23 and section 24 cover mistake of fact. The opening words of section 23 ensure that in the absence of any contrary indication a plea of mistake must be both honest and reasonable; but the closing words of section 24 make it clear that where there is such a contrary indication the mistake need only be honest.

Where vicarious liability is in issue D.'s reply is usually that he did not know of his subordinate's action, often accompanied by the further statements that he had no reasonable opportunity of knowing and that the offender was acting contrary to his instructions. This produces a section 23 situation. Of course, if in the second milk example above D. said that he was sitting in his roundsman's van at the time of the sale and had authorized that particular sale, but had done so under the impression that the object to be sold was a loaf of bread, he would be setting up section 24, and his mistake would have to be reasonable to succeed. But the point is that under neither section can D. be held responsible merely on the ground that he was the employer of the offender.

The conclusion is that where sections 23 and 24 of the Code apply, and prima facie they apply to all offences in Western Australia, there cannot be criminal responsibility either for one's own act or for the act of another without proof at least of negligence. This conclusion needs to be qualified by reference to some incidentally relevant issues. First, it need scarcely be pointed out that to act through an agent, innocent or otherwise, is not to act independently of the exercise of one's will. Second, to act recklessly is not to act independently of one's will. Recklessness as to a consequence of action is advertence to the probability of that consequence combined with an intentional performance of the action. It differs from intention in that the consequence, although foreseen as probable, is not positively desired; but proof of recklessness instead of intention is immaterial so far as section 23 is concerned, for the requisite volitional act is present.[5] Thus, in the second milk example above, if P. proved that D. knew that the milk was sub-standard and did nothing to stop his roundsman taking it out for sale, it would be of no avail for D. to convince the court that he was ignorant of the particular sale alleged, for he was clearly at least reckless to this criminal consequence. Third, the discussion so

[5] This is reinforced by the second paragraph of sec. 23:—"Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial."

far has assumed that the burden of proof remains throughout on the prosecution. The actual result of a plea of ignorance or mistake may well depend on whether the particular statute places the burden of proof of these matters upon D., instead of leaving in operation the usual rule that it is for P. to negative reasonable doubt. Fourth, the relationship between sections 23 and 24 implied by the use of the word "reasonable" in section 24, which was discussed above, leads to certain difficulties in connection with offences requiring a so-called specific intent,[6] but since minor statutory offences of the kind under consideration here are not normally cast in this form, this point need not be elaborated. Fifth, strict responsibility is occasionally expressly imposed by statute. Thus, the requirement of knowledge of the age of the victim is dispensed with by the Code itself in relation to certain sexual offences.[7]

Attention must next be directed to the date and nature of the statute under which the offence is charged. The Criminal Code of Western Australia first came into operation on 1st May 1902.[8] Therefore there can be no doubt that chapter V applies to any statute which came into force before that date. It might be argued that it is unnecessary to have resort to section 36 to establish this point, since the Code would impliedly repeal any prior enactment inconsistent with it. *Per contra,* it might also be said that chapter V is to be read as applying only to offences in the Code of which it forms a part. The virtue of section 36 is that it settles the law. The case is different with statutes which came into force later than, or contemporaneously with, the Code. There can be no doubt that section 36 does nothing to fetter the future legislative competence of the Parliament of Western Australia. There is nothing to prevent chapter V being expressly excluded from application to offences contained in any later statute. Similarly, if a later statute creates an offence in terms which are inconsistent with the terms of section 23 or section 24, so that they cannot stand together with the later enactment, there will be an implied exclusion of these sections. Precisely what amounted to a sufficient inconsistency would have to be worked out by the courts. It is submitted that to deprive any defendant of the protection deliberately

6 It is hoped to discuss these difficulties with reference to the Queensland Criminal Code in a forthcoming issue of the UNIVERSITY OF QUEENSLAND LAW JOURNAL.

7 Code, secs. 205 and 330.

8 Criminal Code Act 1902, repealed and re-enacted (with amendments which do not affect the matters discussed in this article) by the Criminal Code Act Compilation Act 1913.

and solemnly given to him in sections 23 and 24 of the Criminal Code is a serious step, not lightly to be inferred from accidents of draftsmanship in statutes not primarily concerned with the criminal law.

The case law of Western Australia will now be investigated to see to what extent the principles of criminal responsibility just discussed have been applied in practice to offences charged under statutes other than the Criminal Code.

(ii) *The Cases: Strict Responsibility.*

The only case in which the relevance of any of the general sections of the Code to an offence charged under another statute has been observed is *Sharp v. Caratti.*[9] D. was charged with cutting forest produce in a State forest without lawful authority contrary to the Forests Act 1918. His answer was that he made a reasonable mistake within the meaning of section 24 as to where the boundary was, and therefore failed to realise that he was on the wrong side of it. He succeeded before the magistrate but failed on review before the Full Court. Such interest as the case possesses lies in the recognition by the Full Court of the possibility that section 24 might apply to the offence. Unfortunately even this degree of interest is slight. In the first place, it was not found necessary to discuss, still less to decide, the question, since it was held that D.'s mistake was not a reasonable one even if his own story were accepted in full. Secondly, it does not seem likely that their Honours were directing their minds to the true nature of the question involved because they refer[10] not to chapter V of the Code as possibly applying, but to the doctrine of *mens rea.* The somewhat vague doctrine of *mens rea* has no application to Western Australian offences,[11] and any attempt to decide by reference to *mens rea* what can be decided only by reference to the Code can result only in confusion. *Sharp v. Caratti* is therefore of no great weight. There can be no doubt that section 24 of the Code applied to the offence charged, and the most one can say is that the Supreme Court did not express a contrary opinion.

The other cases, in none of which was the Code mentioned, fall into two groups. First there are those of which it is possible to say that although the court failed to see the relevance of section 36, and therefore omitted to consider the question whether chapter V of the

9 (1922) 25 West. Aust. L.R. 133.

10 The brief judgment of the court was delivered by McMillan C.J., Burnside and Draper JJ. concurring.

11 Note 2, *supra.*

Code or any part of it had been impliedly excluded by the particular statute, yet the actual decisions arrived at are not contrary to what one would expect. Into this group fall offences of unlawful possession, where it seems that P. is required to prove knowledge on D.'s part of the presence of the article in question among his belongings.[12] Another example is *Gee v. Wills*.[13] D. was charged with accepting from a consumer a rationing coupon which under the current rationing regulations the consumer was prohibited from using. The facts were that an employee of D. served a customer with some butter in return for currently valid coupons, but when he cut these coupons from the customer's ration book he also cut out five expired coupons, intending merely to destroy the latter as useless. The charge was dismissed on the ground that the employee's act was innocent.[14] P. based his argument on the word "accept", contending that once it was proved that the coupons were accepted in a physical sense, it became immaterial with what intention, if any, they were accepted. It is clear that section 23 of the Code operated to prevent liability arising on this basis, whatever the evidence, but the actual ground of the decision was that the word "accept" conveyed "the idea of an intention to receive and keep the coupons—an intention which was absent here."[15] Similarly, in *Mouritzen v. White*[16] the phrase "knowingly allow" led to the same requirement of guilty knowledge and intention as would have followed under section 23; and in *Stephens v. Taufik Raad*[17] a similar consequence followed on a charge that D., an unqualified person, "held himself out" as a qualified medical practitioner when he had merely misdescribed his qualifications in an advertisement designed to promote sales in his shop and had no intention of practising at all.

Into the second group fall those cases in which the court has imposed strict responsibility. The difficulty about these cases is that since no regard was paid in them to the question whether the particular statute by its terms impliedly excluded sections 23 and 24 of the Code,

12 Wightman v. Copperwaite, (1930) 32 West. Aust. L.R. 101, 103, *per* Dwyer J.; Coleman v. Richards, (1941) 43 West. Aust. L.R. 21, 25, *per* Dwyer J. This may have been the ground of the decision in Savage v. Hungerford, (1902) 4 West. Aust. L.R. 135.

13 (1945) 47 West. Aust. L.R. 24.

14 For which reason vicarious responsibility could not arise.

15 (1945) 47 West. Aust. L.R. 24, 26, *per* Wolff J.

16 (1910) 12 West. Aust. L.R. 158.

17 (1908) 8 West. Aust. L.R. 183. *Cf.* Sanderson, (1910) 12 West. Aust. L.R. 92, where the trial judge attempted to impose strict responsibility by treating the requirement of wilfulness in an electoral offence as a question of law and withdrawing it from the jury.

it cannot be said with any confidence whether they are to be treated as correct or not. It would be unrealistic to try to deduce exclusionary rules from them. One can only record the decisions and wait to see if they will be followed in future, and, if so, for what reasons.

The first in point of time is *Durham v. Ramson,*[18] in which a licensee was charged with having on his premises adulterated liquor for the purposes of sale. D. was convicted even though it was found as a fact that he knew nothing about the adulteration and had not been negligent. The ground of the decision was said to be that the section under which the offence was charged[19] was "one of those sections which make persons offenders although they may have no guilty mind."[20] This decision is the less defensible in that the statute concerned ante-dated the Code. In *Brown v. Shennick,*[21] an honest but mistaken belief by D. that, although unlicensed herself, she was entitled to sell liquor as the agent of a licensed person was held to be no answer to a charge of selling liquor without a licence. The ground of the decision was that the statute[22] imposed strict responsibility, but the result can perhaps be supported on the basis either that the mistake was one of law, or was unreasonable,[23] or both.

In *Robinson v. Torrisi,*[24] D. was held strictly responsible for having "operated" a public vehicle on a road without a licence contrary to the State Transport Co-ordination Act 1933, section 51. Here again the ground of the decision was that an intention to dispense with guilty knowledge should be inferred from the words of the statute. The learned judge came to this conclusion "for three reasons:—(1) from the wording of section 51 itself; (2) because the proviso to that section affords to a driver[25] the defence of want of knowledge of the non-existence of a license (*sic*) and such defence is not given to an owner; (3) by comparison with a prior section of the Act, section 15, where knowledge is necessary. There the requirement of knowledge is plainly set forth by the use of the word "knowingly" . . . I do not think that the omission of the word "knowingly"

18 (1907) 9 West. Aust. L.R. 76.
19 Sale of Liquors Amendment Act 1897, sec. 7.
20 (1907) 9 West. Aust. L.R. 76, 77, *per* McMillan J.
21 (1908) 10 West. Aust. L.R. 107.
22 Wines, Beer and Spirit Sale Act 1880.
23 The parties had previously failed to obtain permission from the magistrates to transfer the licence to D.
24 (1938) 40 West. Aust. L.R. 62.
25 D. was charged as the owner of the vehicle, not on the basis of vicarious responsibility, but as having contravened a duty placed on him personally by sec. 51.

in section 51 is deliberate."[26] None of these reasons necessarily amounts to a ground for inferring an implied exclusion of sections 23 and 24 of the Code. The omission of the word "knowingly" might conceivably be taken to exclude full guilty knowledge under section 23, but it is hard to see how it could affect reasonable mistake of fact under section 24. The same applies to points (1) and (2) also.

Lastly, in *Sweeney v. Denness*,[27] D. was charged with knowingly supplying liquor to "a person under the age of 21 years" contrary to the Licensing Act 1911-1951, sec. 147 (1). Dwyer C.J. treated the case as turning "on one point, and one point only, and that is whether it was established by the prosecution that Moriarty[28] was a person under the age of 21 years."[29] With all respect, the inquiry should have been directed also to ascertaining whether the statute in question excluded sections 23 and 24 of the Code, for, if they applied, the prosecution should have been required to establish not merely that Moriarty was under 21, but also that D. knew or ought to have known this fact.

(iii) *The Cases: Vicarious Responsibility.*

There is no case under this head in which the Code has been mentioned at all. As with strict responsibility, the decisions reveal what has been called in a similar context elsewhere an "entire disregard" of the applicable principles.[30]

It will be recalled that the charge against D. in *Gee v. Wills*[31] was dismissed on the unexceptionable ground that the act of his employee was not criminal. Similarly, in *Duce v. McGuffie*,[32] where D. was charged with selling liquor without a licence contrary to the Wines, Beer and Spirit Sale Act 1880, sec. 39, the prosecution failed on the ground that D.'s agent, who had actually made the sale, acted outside the scope of his authority in doing so. The decision is clearly right, for if the agent was acting outside the scope of his authority, he was acting independently of the exercise of D.'s will within section 23. In *Walsh v. Rosich*[33] the licensee of a hotel was charged with permitting drunkenness contrary to the Licensing Act 1911-1944, sec.

26 (1938) 40 West. Aust. L.R. 62, 65, *per* Dwyer J.
27 (1954) 56 West. Aust. L.R. 52.
28 The person supplied.
29 (1954) 56 West. Aust. L.R. 52, 53.
30 Philp J. in (1950) 1 U. QUEENSLAND L.J. 1, at 4.
31 Note 13, *supra*.
32 (1909) 11 West. Aust. L.R. 118.
33 (1947) 49 West. Aust. L.R. 74.

163, only his employee the barman being present at the material time. D. was acquitted on the ground that neither he nor his employee could have known the material facts. It is not clear whether D.'s liability depended, as in *Gee v. Wills,* on the liability of his employee or not.[34] In *Cooper v. Royal Antediluvian Order of Buffaloes,*[35] a charge against a corporation of unlawfully dealing in liquor contrary to the Illicit Sale of Liquor Act 1913, sec. 3, was dismissed on the ground that the individual who ordered the liquor, the treasurer of the corporation, was acting in the transaction as the agent of another body and not of the corporation itself.

The foregoing cases fall on the right side of the line. On the other side are to be found such cases as *Mold v. Hodges*[36] and *Lynch v. Brown.*[37] In *Mold v. Hodges,* D. was charged with an offence against the Bread Act 1903-1947, sec. 24 (1):—"After bread has been delivered to any person for sale, or after bread has been sold and delivered to any person, no person shall accept redelivery of, or exchange, or take back into stock, the bread so delivered." A customer of D. had a standing order for two full loaves of bread to be delivered daily. On the day in question D.'s roundsman S. by mistake left one full loaf and two half loaves. The customer discovered the error almost at once and sent her young son after S. with the two half loaves to exchange them for the full loaf ordered, a request with which S. complied. D. was not present and knew nothing of the occurrence, but he was convicted. The judgment contains no discussion of vicarious responsibility, yet it was clearly relevant to ascertain if sections 23 and 24 applied to the offence charged, and, if so, to see whether S.'s act occurred independently of the exercise of D.'s will, which it obviously did.

In *Lynch v. Brown,* D.'s employee gave an unstamped receipt contrary to the Stamp Acts 1882 and 1913. It was clear that D. had had nothing to do with the transaction and knew nothing of it, yet he was convicted simply on the basis that the employee was acting within the scope of his employment. The case forms an instructive contrast with *Duce v. McGuffie*[38] where the same test of scope of

34 It is doubtful whether Higgs v. Petricovich, (1945) 47 West. Aust. L.R. 18, is to be regarded as a case of vicarious liability. The ground of the conviction seems to have been that D. deliberately sent his agent out to sell substandard milk—which is unexceptionable.

35 (1948) 50 West. Aust. L.R. 72.

36 (1948) 50 West. Aust. L.R. 47.

37 (1917) 19 West. Aust. L.R. 78.

38 Note 31, *supra.*

employment led to D.'s acquittal, for it shows that it would not be correct to equate this common law test with liability under the Code. It may be doubted whether the employee in *Lynch v. Brown* was employed to give unstamped receipts. There should have been evidence at least that D. negligently failed to prevent his employee's failure to stamp the receipt.

(iv) *Conclusions.*

If the principles of criminal responsibility deduced in part (i) of this article are the law of Western Australia, and it is respectfully submitted that they are, the only conclusion to be drawn from the survey of the case law which followed is that the courts have hitherto been unobservant of them. A disturbing unpredictability has been introduced into the law for no good reason. A defendant charged with an offence against a statute other than the Code cannot tell with any certainty whether the normal rules of criminal responsibility will be applied to him or not. Such a state of affairs conflicts with one's sense of justice and scarcely enhances the dignity and effectiveness of the law. It is to be hoped that the future will tell a different story. If it be thought that on some occasions a defendant should be deprived of the protection afforded by sections 23 and 24 of the Code, then the immediate need is to work out rational and predictable rules of implied exclusion. But if it be thought that these sections embody elementary principles of justice upon which even the least of offenders ought to be able to rely, then sections 23 and 24 should be allowed their full force and effect until Parliament expressly legislates to the contrary.

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