STRICT LIABILITY AND THE EUROPEAN CONVENTION

A BASIC concept in criminal law is the culpability principle: that people should be punished only for acts or omissions for which they are to blame, in the sense that they committed them intentionally, recklessly or negligently. For prosecutors who (as usual) "know" that every defendant whom they accuse is guilty, the resulting need to prove both the defendant's act and fault is a time-consuming and expensive obstacle to justice; and over the years, the concerted efforts of Ministers, Parliament and the courts have done much to relieve them of it by three devices (sometimes alone, and sometimes used in combination). The first is the reverse burden of proof, where the prosecutor only has to prove the actus reus, and the defendant then has to persuade the court that he was not at fault. They second and more stringent device is strict liability, where the actus reus constitutes the whole offence and the fault element is eliminated altogether. And the third is "situational liability". Here, what would normally be the evidence for the offence is turned into the offence itself; instead of being defined as a blameworthy act or omission, the offence consists of a state of affairs that commonly suggests one—and, where this is proved, the defendant is guilty whether he did anything or not (and let alone whether he was to blame for it). A series of recent cases discuss the compatibility of these devices with the European Convention on Human Rights.

In *Barnfather* v. *Islington Education Authority* [2003] EWHC 418 (Admin), [2003] 1 W.L.R. 2318 the Divisional Court was faced with strict and situational liability. Section 444 (1) of the Education Act 1996 provides that "If a child of compulsory school age who is a registered pupil at a school fails to attend regularly at the school, his parent is guilty of an offence". As previously interpreted, this provision imposes strict liability. (The maximum penalty is a fine of £1,000; an aggravated version, added in 2000, now makes the parent liable to imprisonment where he knew of the failure to attend school and negligently failed to do anything about it.) Ms. Barnfather, who had been convicted and fined for the simple offence, appealed to the Divisional Court by way of case stated, claiming that the traditional interpretation of section 444 (1) as a strict liability offence is incompatible with the Convention. She based her argument on Article 6(2), which provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". A Divisional Court composed of Maurice Kay and Elias JJ. dismissed her appeal.

Her appeal failed because, in the view of both judges, Article 6(2), like the rest of Article 6, is concerned with procedural

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fairness, not fairness in substantive law. Article 6 lays down the requirements for a fair trial, for whatever the legislature chooses (however unfairly) to decree to be a criminal offence. Thus it prevents (within limits) contracting States creating offences the elements of which the defendant is required to disprove: but it does not impose any minimum requirements as to what those elements should be. Article 6, in other words, is about "fair trials", not "fair laws", and the courts must not use it to re-write the underlying substantive law—as Elias J. reminded us, with reference to the decision in *Osman* v. *UK* (1998) 29 E.H.R.R. 245, and the controversy this provoked.

This outcome satisfied Maurice Kay J.'s sense of justice. He went on to say that, if Article 6(2) did in principle strike at strict liability as well as reverse burdens of proof, he would still have reached the same result. In the leading case of *Salabiaku* v. *France* (1988) 13 E.H.R.R. 379 the Strasbourg Court said legislation may contradict the letter of Article 6(2), provided it is limited to petty offences that carry minor penalties. In his view, strict liability for the offence in section 444 (1) of the Education Act was consistent both with the spirit of the decision in *Salabiaku*, and the tests that English law has traditionally applied in determining whether an offence carries strict liability.

Elias J., by contrast, was deeply unhappy with it. The standard prosecution arguments that had convinced Maurice Kay J. he thought were seriously inadequate.

> The fact that the prosecution of blameless persons will be rare or that there are other routes for achieving the objectives of the statute seem to me to point strongly against the need for the legislation at all rather than in support of it. Furthermore, it is of no benefit to an innocent parent successfully prosecuted to be told that he or she is something of a rare specimen .... The strict liability offence is disproportionate to the objective to be achieved.

Only the existence of binding precedent obliged him to accept that section 444 (1) imposes strict liability; had he been free to do so he would have decided the point the other way. He accepted that Article 6(2) was limited to reverse burdens of proof: but he saw a paradox in the fact that the Convention enables the courts to confront the less serious legislative invasions of the culpability principle, whilst leaving them powerless against those that are more drastic.

The *Barnfather* case decides that the excessive use of strict liability is not contrary to Article 6 (2) of the Convention. But is it

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limited by any other part of the European Convention, or its attendant Protocols?

The Court of Appeal decision in *International Transport Roth GmbH and others* v. *Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] Q.B. 728 suggests that it may be. That case, it will be recalled, arose from one of the Government's attempts to construct in the name of state security a parallel penal universe, in which people are punished by the Home Office rather than the courts.

To deter carriers from importing illegal immigrants, the Government (acting under delegated powers) set up a scheme under which a carrier incurred for every illegal immigrant found on his vehicle an administrative penalty of £2,000—to be funded, if necessary, by the sale of the vehicle, potentially confiscated pending payment. The carrier could, in theory, escape liability by proving certain facts consistent with due care: but it was the Home Secretary, whose officials imposed the fine, who also had to be satisfied these facts were proved. By a majority, the Court of Appeal found this scheme to be incompatible with the Convention. First, it failed to comply with the "fair trial" requirement of Article 6(1), because it made the Home Secretary the judge in his own cause. Second, the proceedings counted for Convention purposes as "criminal"; thus the additional procedural safeguards contained in the rest of Article 6 had to be respected, which they were not, because the reverse burden of proof was incompatible with Article 6(2).

Third—and here is the point relevant to strict liability—the Court of Appeal said that the blanket fine of £2,000 per head, unvarying with the carrier's fault or absence of it, was contrary to Article 1 of the First Protocol to the Convention, which guarantees security of property. This Article permits the State to confiscate the property of citizens where the "public interest" requires this, but (as the Strasbourg Court said in *James* v. *United Kingdom* (1986) 8 E.H.R.R. 123) there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised". This principle is broken, they thought, by fines that bear no relation to the defendant's fault.

But if this is right, it leaves us with another paradox. If the First Protocol prohibits fines that bear no relation to the defendant's fault, what about imprisonment? In *R.* v. *Drew* [2003] UKHL 25, [2003] 1 W.L.R. 1213 and a series of cases that preceded it, attempts were made to use Article 3 (prohibition of torture etc.) and Article 5 (right to liberty and security) against statutes imposing mandatory prison sentences. Although they failed,

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they did so on the facts—and the courts seemed ready to accept, in principle, that these Articles could apply against prison sentences that are completely disproportionate to fault. As the Criminal Justice Act 2003 has now prescribed mandatory prison sentences for a list of Firearms Act offences that carry strict liability, the day may come when this argument succeeds.

J.R. SPENCER

RECKLESSNESS RESTORED

Two boys, aged 11 and 12, go camping one night without their parents' consent. In the early hours of the morning they wander into a supermarket car park, set fire to some newspapers which they find there, bundle these under a pair of plastic wheelie-bins against the wall, and leave. A million pounds of fire later, they are charged with arson of the supermarket and of buildings standing nearby. Such in a nutshell are the simple facts of *G and another* [2003] UKHL 50, [2003] 3 W.L.R. 1060. The law is no less simple. There was no question of the boys having intended to burn down the buildings, and it was accepted that neither foresaw any risk of this (para. [2]). But the risk was one which would have been obvious to a reasonable person—a reasonable adult person, that is—and, impeccably directed along the lines laid down in *Caldwell* [1982] A.C. 341 that the failure to give thought to such an obvious risk was sufficient *mens rea* for the offence, the jury duly convicted them. The Court of Appeal, bound by *Caldwell*, upheld the convictions. The House of Lords was not so constrained and reversed them. Departing from *Caldwell*, they reinstated the law as it was thought to stand before 1982, in line with the test associated with *Cunningham* [1957] 2 Q.B. 396: in offences under the Criminal Damage Act 1971 a person will be "reckless" only if he or she foresees a risk and nonetheless goes on to take it unreasonably.

Caldwell was a terrible decision, and no lawyer will lament its consignment to the scrap-heap of legal history. It introduced into the criminal law an unprincipled distinction between criminal damage and offences against the person. Its mechanical application led to palpably unjust results, particularly where the defendant was young or educationally sub-normal. And as a piece of statutory interpretation it was shoddy, if not downright shocking. Whatever the threshold for the House of Lords to depart from its own previous decisions, it was comfortably satisfied here. None the less, it would be premature simply to breathe a sigh of relief. For all its

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