

# STRICT LIABILITY

## A COMPARATIVE STUDY OF ERISA

### AND THE FEDERAL LABOR-LAW

1

2

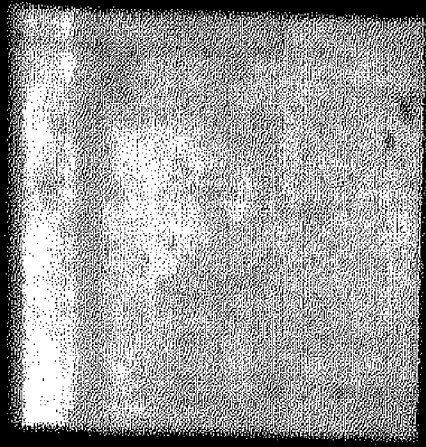
3

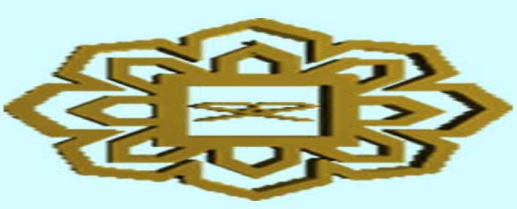
4

5

6

7





**STRICT LIABILITY**  
**A COMPARATIVE STUDY OF ENGLISH,**  
**MALAYSIAN AND ISLAMIC LAWS**

**BY**  
**MD. ABDUR RAHMAN**  
**MATRIC NO: G9210882**

**A DISSERTATION SUBMITTED IN PARTIAL**  
**FULFILMENT OF THE REQUIREMENTS FOR THE**  
**AWARD OF MASTER OF COMPARATIVE LAWS.**

**KULLIYYAH OF LAWS**  
**INTERNATIONAL ISLAMIC UNIVERSITY, MALAYSIA.**

**MAY, 1993.**

## **PREFACE**

The basic principle of law is that no act is criminal unless there is mens rea i. e. committed with a guilty intention. But to curb certain recurring crimes and to safeguard the public welfare, the law makers have enacted some laws which have made many acts criminal even if committed without mens rea or guilty intention. Such offences are called strict liability offences in English and Malaysian laws.

The bulk of these offences are the creation of statutes. The law relating to strict liability can be found in English and Malaysian statutory laws.

The indication of strict liability offences also can be found in Islamic criminal law. In fact, the strict liability offences in Islamic law are much more wider than those of English and Malaysian laws. For instance, under Malaysian and English law, murder committed by mistake of fact is a complete defence. But it is not so under Islamic law. A person who commits murder by mistake is excused from criminal liability. But he is not excused from civil liability. That is to say that he will not be subjected to Qisas punishment. But he must pay the compensation to the heirs of the victim.

## II

It is because Islam Attaches the greatest importance to the sanctity of human life. Islam declares life and property as sacred. So by any pretext life of an individual can not be taken away without punishment. Mistake of fact in Islamic law is not an absolute excuse from the liability. The person who has done the act even by mistake is still strictly liable to compensate the victim's family. Thus liability in this sense is strict.

Another example of strict liability under Islamic law may be that though a culprit by producing false evidence may get rid of punishment in this world he will still be accountable in the next world for his wrong deeds. But if the violation of law is related to the person himself he may be excused by repenting to Allah. However, He will not be excused if the case is related to the right of the people.

Due to the scarcity of materials on Islamic part, I found it very difficult to compare the concept of strict liability with Islamic law. Therefore, I tried to provide the general principles from the Holy Qur'an and sunnah in support as solutions.

This study is undertaken with the purpose of offering Shariah as alternative to the problems manifested by strict liability. It is my firm conviction that Islamic law is capable of solving the problems of strict liability. Apart from Hudud and Qisas which are severe in nature, Islamic law has provided Ta'zir or discretionary punishment fourteen hundred years ago to effectively reduce the rate of petty crimes and the crimes which do not fall under Hudud or Qisas to maintain order, peace and tranquillity in the society. If Islamic law were implemented, the problems of strict liability would never arise to combat offences against public welfare. Strict liability is included in Islamic law.

This dissertation has eight small and long chapters. Chapter one, two and three deals with the concept, meaning, nature, significance, reasons, brief history of strict liability and strict liability under Malaysian Penal Code.

Chapter four deals with the concept of punishment in Islamic criminal law and its approach to strict liability offences.

#### IV

Chapter five deals with the comparative study of cases related to strict liability offences and position of Islamic law in this regard.

Chapter six deals with the comparative study of murder committed by mistake. Here I tried to make a point that under English, Indian and Malaysian law murder committed by mistake is a complete defence. But under Islamic law it is not a complete defence. A murderer must pay blood-money to the victim's family for his wrong-doing. In this way it is an strict liability offence under Islamic law.

Chapter seven deals with the defences to strict liability offences. Although I attempted to discuss defences to strict liability, in final analysis there is no defence in modern statutory law of strict liability. This chapter also deals with the defences to criminal liability under Islamic law.

Chapter eight deals with the criticism, proposals and solution to the problems of strict liability.

I would like to express my heartfelt thanks and gratitude to my learned supervisor professor Doctor Muhammad Ata al-Sid for his sincere help, valuable suggestions, encouragement and scholarly advice given to me throughout

the various stages of writing this dissertation. A study of this nature would not have been possible without his guidance and assistance. May Allah reward him accordingly for his able supervision and assistance.

I would also like to thank Associate Professor Qaisar Hayat for his kind help, valuable advice and suggestions to improve the conventional part of this study.

I wish to record my deep appreciation and gratitude to my beloved teacher Mr. Mujibul Hoque, the Headmaster of Natun Paltan Line High School, Azimpur, Dhaka, Bangladesh who is a continuous source of inspiration and encouragement since my schooldays. His scholarly virtues and invaluable advice given from time to time have everlasting impact on my person. Indeed, he has imbedded in me his scholarly advice to be steadfast and face all sorts of challenges in the pursuit of more advance learnings.

I am indebted to the authority of International Islamic University, Malaysia for giving me an opportunity and providing me with much needed financial assistance to pursue my master of comparative laws programme.

Last but not least, my sincere thanks to all my friends and those who helped me and generously contributed to the completion of this work.

Md. Abdur Rahman

Kulliyyah of laws,

International Islamic University,

Malaysia.

May, 1993.



TABLE OF CONTENTSCHAPTER I

## THE CONCEPT OF STRICT LIABILITY

A.	Introduction	2
B.	Meaning of Strict Liability	4
C.	Nature of Strict Liability	6
D.	Significance of Strict Liability in the Present Era	10
E.	Reasons for Strict liability	11

CHAPTER II

A BRIEF HISTORY OF STRICT LIABILITY	18
-------------------------------------	----

CHAPTER III

STRICT LIABILITY AND THE PENAL CODE OF MALAYSIA	26
---	----

CHAPTER IV

THE CONCEPT OF PUNISHMENT IN ISLAMIC CRIMINAL LAW AND ITS APPROACH  
TOWARDS STRICT LIABILITY:

A.	THE CONCEPT OF PUNISHMENT IN ISLAMIC CRIMINAL LAW:	
I.	Introduction	33
II.	Concept of Crime in Islam	34
III.	Definition of Punishment	39
IV.	The Concept of Punishment in Pre-Islamic Thought	40
V.	Islamic Concept of Punishment	42

## VIII

VI. Object of Punishment	44
VII. The Aims of Punishment in Islamic Law	48
VIII Characteristic of Qur'anic Punishment	52
<b>B. CLASSIFICATION OF CRIMES</b>	
I. Hudud (Fixed Punishment).	55
II. Qisas and Diyah	57
III. Ta'zir	62
<b>C. THE POSITIONS OF STRICT LIABILITY OFFENCES IN THE SHARIAH:</b>	
I. The Element of Intention.	77
II. Penal Punishment (Ta'zir) in Public Interest.	83

## CHAPTER V

### CASES OF STRICT LIABILITY IN STATUTORY OFFENCES - A COMPARATIVE ANALYSIS:

A. Introduction	89
B. Offences Related to Intoxicating Liquor	91
C. Offences Related to Drugs.	99
D. Offences Related to possession of Firearms.	111
E. Offences Related to Sale of Food.	121

CHAPTER VI

MURDER COMMITTED BY MISTAKE AND ITS RELATION TO STRICT LIABILITY - A COMPARATIVE ANALYSIS.	132
--	-----

CHAPTER VII

DEFENCES TO STRICT LIABILITY:

A. Defences to Strict Liability offences in English Law	148
B. Defences to Strict Liability in Singapore and Malaysia	152
C. Defences in Islamic Criminal Law	159

CHAPTER VIII

CONCLUSION:

A. Criticism about the Imposition of Strict Liability	167
B. Proposal for Reform.	171
C. Solutions in Islamic Law.	177

## TABLE OF CASES

1. R V. Tolson (1889) 23. QBD 168.
2. Sherras V. De Rutzen (1895) 1 QB 918.
3. Pharmaceutical Society of Great Britain V. Storkwain  
(1985) 3 All ER 4 DC
4. Pearks, Gunston & Tee Ltd V. Ward (1902) ...
5. Sweet V. Parsley (1969) AC 839, (1970) 1 All ER 347.
6. Alphacell Ltd V. Woodward (1972) AC 824.
7. Cameron V. Holt (1980) 28 All ER 490.
8. Mc Crae V. Downey (1947) V.L.R. 194.
9. Hobbs V. Winchester Corp. (1910) 2 KB 471.
11. Proudman V. Dayman (1941) 67 C.L.R. 536.
12. Lim Chin Aik V. R [1963] AC 160.
13. Reynolds V. G. H. Austin and Sons Ltd. (1951) 2 KB  
135.
14. Gammon (Hong Kong) Ltd. V. Attorney-General (Hong  
Kong) [1984] 2 All ER 503.
15. Barnes V. State (19 Conn. 398 (1849)
16. Margate Pier Co. V. Hannam (1919) 3 B & Ald.
17. Chesholm V. Doulton (1889) 22 QBD.
18. AG V. Bradlough (1885) 14 QBD.
19. Fitz Patrick V. Kelly (1873) 15 M & W, 404, 153 ER  
907.
20. R V. Woodrow (1846) 15 M & W 404, 153 ER 907.

XI

21. Westminster City Council V. Croyal Grange Ltd.  
[1986] 2 All ER 353, [1986] 1 WLR 674, HL
22. Brooks V. Mason [1902] 2 KB 743, 72 LJKB 19, DC...
23. Cundy V. Le Cocq (1884) 13 QBD 207 (CCR).
24. Seah Eng Joo V. R (1961) MLJ 252.
25. Ayavoo V. Public Prosecutor [1966] 1 MLJ 242.
26. Renninger V. Forgosa [1551] KB 75 Eng RI.
27. DPP V. Beared (1920) AC 479.
28. Warner V. Metropolitan Police Commissioner [1968] 2  
All ER 356.
29. Fernandez [1970] Crim LR 277, CA.
30. Patel [1970] Crim LR 274, CA.
31. Irving [1970] Crim LR 642, CA.
32. Marriott [1971] 1 All ER 595.
33. Attorney General V. Lim Ho Puah [1905] S.S.R. 13.
34. Chong Kwong V. Public Prosecutor [1935] MLJ 41.
35. Tan Yong Sin V. Public Prosecutor (1939) MLJ 86.
36. R V. Tan Hoay (1938) MLJ 216.
37. R V. Howells [1977] 2 WLR 716 CA.
38. Sulong Bin Naim V. Public Prosecutor [1966] 1 MLJ  
242.
39. Tan Hua Lam V. Public Prosecutor [1966] 1 MLJ 147.
40. Lee Hoo Boon V. Public Prosecutor (1966) 2 MLJ 167.
41. Subramaniam V. Public prosecutor [1956] 1 WLR 965,  
(1956) MLJ 220.
42. Liew Sai Wah [1960] 2 MLJ 1.

XII

43. Smedleys Ltd. V. Breed [1974] AC 839, [1974] 2 ALL ER 21 HC.
44. Parker V. Alder [1899] 1 QB 20.
45. Watson V. Coupland [1945] 1 ALL ER 217.
46. Quality Dairies (York) Ltd. V Pedley [1952] 1 All ER.
47. Pengurus, Rich Foods Production Sdn. Bhd. (1982) 1 MLJ 302.
48. Chiranji V. The State of Maharashtra (1952) AIR 282.
49. Wong Swee Chin (1981) 1 MLJ 212.
50. Bonda Kui V. Emperor (1943) Patna, 64.
51. Bakr V. Till Stone (1894)

**CHAPTER ONE**

CHAPTER 1

1. THE CONCEPT OF STRICT LIABILITY
  - A. Introduction
  - B. Meaning of Strict Liability
  - C. Nature of Strict Liability
  - D. Significance of Strict Liability in the Present Era.
  - E. Reasons for Strict Liability



CHAPTER I

## THE CONCEPT OF STRICT LIABILITY

A. Introduction

The general principle of law is that no act is criminal unless there exists mens rea i.e. committed with a guilty mind. In other words, in order to constitute a crime there must be two elements such as:

1. Actus rea (act done) and
2. Mens rea (guilty mind).

Mens rea is the absence of an honest and reasonable belief in the existence of circumstances which if true, would make the act or omission for which the accused is indicted innocent, i.e. not amounting to the offence charged.<sup>1</sup>

In order to lessen the inconvenience and harm to the people and for the welfare of the society at large, the law maker or parliament has made many acts criminal even if committed without mens rea. It called in legal term as strict liability. Strict liability is an exception to the general rule. Crimes which may be committed by an accused who acts without intention, recklessness or

---

<sup>1</sup> R.V. Tolson (1889) 23. Q. B.D. 168, 181.

negligence are referred to as crimes of strict liability.

Liability is strict because the prosecution is relieved of the necessity of proving mens rea. However, the prosecution is not exempted from proving the actus reus i.e. the guilty act. Strict liability offences are almost entirely the creation of statute. In fact statutes said to create crimes of strict liability are usually ambiguous, and the justifications for imposing strict liability are thus to be found in principles of interpretation based on considerations of public policy. Strict liability is most often imposed in respect of commonly recurring and less serious offences such as illegal sales of liquor, sales of impure or adulterated food or drugs, violation of traffic regulations, violation of regulations designed to protect public health or safety etc.

The continuing increase in the number of crimes defined without reference to any mens rea represents a disturbing phenomenon. The existence of crimes of strict liability constitutes an important and wide ranging exception to the general principle that an accused ought not to be convicted of an offence where his conduct did not involve an element of moral culpability.

Criteria of the exclusion of mens rea:

Whether an offence should be regarded as strict or not has been laid down by Wright J. in SHERRAS V. DE RUTZEN.<sup>1</sup>

There is a presumption that mens rea or evil intention or knowledge of the wrongfulness of the act is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered.

B. Meaning Of Strict Liability:

An offence of strict liability is one where an element of mens rea is dispensed with. Such crimes represent an exception to the general rule whereby proof of blame is normally a prerequisite to the imposition of criminal liability. With crimes of strict liability an accused can be convicted even though he had no mens rea and was not blameworthy in any other way.

---

<sup>1</sup>(1895)1 Q.B918

An offence is said to be one of strict liability if mens rea (guilty mind) is not necessary for a conviction, or alternatively if liability may be established on proof of the actus reus alone.<sup>3</sup> mens rea we shall understand as foresight of consequences and knowledge of surrounding circumstances.<sup>4</sup> Absolute liability and absolute prohibition are often used to convey the same meaning as strict liability, though the two former expressions suggest disregard for more than just mens rea and should therefore be taken as capable of a wider meaning than the later.<sup>5</sup>

Osborn's Concise Law Dictionary defines strict liability as liability without fault i.e. where a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongly intent or negligence.<sup>6</sup> Whereas, Williams says that an offence is one of strict liability if mens rea (guilty mind) is not necessary for a conviction, or alternatively if liability may be established on proof of the actus reus

<sup>3</sup> Glanville Williams, Criminal Law: The general part (2nd ed, 1961). p.215.

<sup>4</sup> William op. cit, 31, 34.

<sup>5</sup> Cross & Jones, Introduction to Criminal Law (10th ed. 1984) p. 72.

<sup>6</sup> Osborn's Concise Law Dictionary (7th ed, 1983, by Roger Bird) p. 212.

alone.<sup>7</sup>

C. Nature of Strict Liability:

In legal language an offence of absolute or strict liability means one in which some element does not require proof of fault. Most offences are now defined by statute. It is a question of construction whether the offence requires a mental element and, if so, what that mental element is. Often the definition uses a word or a phrase - 'knowingly', 'with intent to', 'recklessly', 'wilfully', 'dishonestly', and so on - which gives guidance to the court. Often the definition uses a verb or noun which imports a mental element of some kind 'permits', 'appropriates', 'possesses', are examples - so that there cannot be an actus reus without that mental element.

It does not follow that, where no word or phrase importing a mental element is used, the court will find that mens rea is not required. On the contrary the courts have frequently asserted that there is a presumption in favour of mens rea which must be rebutted by the prosecution; but the application of this presumption has been far from consistent.

<sup>7</sup> Williams, op.cit. p. 215.

There are many offences known as offences of strict liability or absolute prohibition where it is commonly said that 'no mens rea' need be proved. An unsophisticated lawgiver tends to word offences in absolute terms, but this does not necessarily mean that he wishes them to be construed absolutely. There is no fixed rule of interpretation in respect of edicts absolute in their terms. Generally the courts read them straight, so that people who are without fault are convicted. Liability imposed without fault can be found in the case of PHARMACEUTICAL SOCIETY OF GREAT BRITAIN V. STORKWAIN (1985) 3 ALL ER 4, DC. The medicines Act 1968, S 58(2) provides that no person shall sell by retail specified medicinal products except in accordance with a prescription given by an appropriate medical practitioner. The defendant supplied specified drugs prescriptions purporting to be signed by Dr. IRANI. The prescriptions were forged. There was no finding that the defendants acted dishonestly, improperly or even negligently. So far as appeared, the forgery was sufficient to deceive the sellers without any shortcoming on their part. Yet the Divisional Court directed the magistrate to convict.

Lord Edmund Davies in WHITE-HOUSE V. LEMON (1979) 1 ALLER 898 at page 920 cited the statement in Smith & Hogan (5th edition), P. 920 that 'an offence is regarded - and properly regarded - as one of strict liability of no mens rea need be proved as to a single element in the actus reus'. The single element is, however, usually one of crucial importance so the effect is that a person with no moral culpability may be convicted.

The creation of absolute offences is not new. Lord Reid says:

"Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter" .....

There may be cases in which as Channel J. said PEARKS, GUNSTON & TER LTD V. WARD (1902): `.....

The Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any mens rea or not, and whether or not he intended to commit a breach of the law. Thus in diverse situations and circumstances and for any one of a variety of reasons parliament may see fit to create offences and make people responsible before criminal courts although there is an absence of mens rea.'

Lord Pearce has given us some of the requisites to look for in offences of strict liability. He said:

"But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that parliament intended that the act should be prevented by punishment regardless of intent or knowledge."

It was observed by the decision of SWEET V. PARSLEY (1970) as the rationale that mental element of mens rea can be excluded by statute has seen its last days and that the case has finally laid down the rule which now is settled law that a presumption of mens rea must always be implied even in cases where the legislature merely makes the commission of the prohibited act an offence. But this apparently does not seem to be true even after the case. In the case of ALPHACELL LTD V. WOODWARD,<sup>8</sup> the courts seem to have quite firmly and categorically viewed SWEET V. PARSLEY<sup>9</sup> as merely laying a general proposition of law and that courts are still free to determine whether a given statute is intended to oust the requirement of mens rea or not.

<sup>8</sup>(1972) AC 824.

<sup>9</sup>(1969) 1 All ER 347, (1970) AC 839.