

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

31/10/07

IND. NO. 6 OF 2007 (A & B)

REGINA

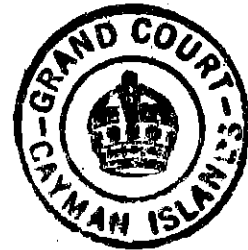
V.

GODFREY BOWEN
AIR TECH CORPORATION LTD C/O GODFREY BOWEN

Appearances: Mr. Trevor Ward of the Legal Department for the Plaintiff,
the Crown
Mr. Clyde Allen of Clyde Henry Allen for the Defendant

Before: Hon. Justice Sanderson

Heard: October 8, 9, 10 and 12, 2007



JUDGMENT

1. The legal issues for determination are whether sections 3(2) and 7, of the *Health Insurance Law* (15 of 1997 as amended) create absolute liability offences. At the conclusion of the trial I ruled that those sections were absolute liability offences and instructed the jury accordingly. I told counsel that I would provide written reasons.

2. Sections 3(1), 3(2) and 7 provide:

“3(1) Every person resident in the Islands shall, unless he is –

- (a) covered by a contract of insurance effected by an employer under subsection (2);
- (b) covered by a contract of insurance effected by



Government under subsection (3), or where Government does not effect such a contract, medical services are provided to him by Government in accordance with Chapter 18 of the General Orders of the Government; or

(c) an uninsurable person,

effect a standard health insurance contract in respect of himself, his unemployed spouse and children.

(2) Subject to this section, every employer shall effect and continue on behalf of -

- (a) himself;
- (b) his unemployed spouse and children;
- (c) each of his employees; and
- (d) any child and unemployed spouse of an employee,

a standard health insurance contract.

7. An employer who deducts from the salary, wage or other remuneration of an employee more than the amount which he is entitled to deduct in respect of any person under section 5 or 6 is guilty of an offence and liable on summary conviction to a fine of two thousand dollars, and on conviction on indictment to a fine of five thousand dollars.”

3. The language of those sections does not clearly state that those offences are strict or absolute liability. It would have been easy for the draftsman to have stated that proof of *mens rea* is not a required element for these offences. That failure is not, however, necessarily fatal. There are many examples where the courts have found strict liability offences absent clear statutory language.

4. It is well established that there is a presumption that *mens rea* or a guilty mind must be proved as an element of every offence. The Privy Counsel in *Lim Chin Aik v. the Queen* [1963] 196 AC 160 approved the conclusion reached by Lord Wright in *Sherras v. De Rutzen* [1895] 1 Q.B. 918; where he said at page 921:

“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.”

5. The Board at page 173 also approved a similar opinion expressed by Lord Goddard, C. J. in *Brend v. Wood* (1946) 2 T.L.R. 462 where he said:

“It is in my opinion of the utmost importance for the protection of the liberty of the subject that a 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 a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.”

6. Those propositions remain sound. The challenge for the court is to determine the proper inferences to be drawn from both the statutory language and the subject matter with which it deals.
7. The Board in *Lim Chin Aik (supra)*, observed that when the subject matter of the statute is a regulation for the public welfare of a particular activity, it has been frequently inferred by the courts that the legislature intended that such activities should be carried out under conditions of strict liability. Lord Evershed then stated at page 174:

“The presumption is that the statute or statutory instruments can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*.”

Lord Evershed continued at pages 174 and 175:

“That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement 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 cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim.

Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended.”

8. The House of Lords dealt with the issue of whether legislation was to be construed as imposing strict or absolute liability in *Sweet v. Parsley* [1969] 1 All E.R. p. 24. Lord Reid concluded that it was a well established principle that *mens rea* was an essential ingredient of every offence unless some reason could be found for holding it was not necessary. He said at page 350:

“It is also firmly established that the fact that other sections of the Act expressly require *mens rea*, for example because they contain the word “knowingly”, is not in itself sufficient to justify a decision that a section which is silent as to *mens rea* creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say “must have been”, because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.”

9. In separate reasons Lord Diplock at page 362 addressed the question in this way:

“But where the subject-matter of the statute is a regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice as to whether they participate or not, the court may feel driven

to infer an intention of Parliament to impose, by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibitive act, without regard to those considerations of cost or business practicability which play a part in the determination of what could be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not likely to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can be directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see *Lim Chin Aik v. The Queen* [1963] 1 All E.R. 223 at p. 228; [1963] AC 160 at p.174.”

10. In *Gammon (Hong Kong) Ltd. v. the Attorney-General of Hong Kong* [1985] 1 AC p. 1 the Privy Council again considered the issue of absolute liability offences and referred to the authorities I have previously mentioned. The Board concluded that the law relating to the construction of statutory provisions creating strict or absolute liability offences could be summarized in five propositions. Lord Scarman stated at page 14:

“In their Lordships’ opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants’ counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is “truly criminal” in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by

encouraging greater vigilance to prevent the commission of the prohibited act.”

11. In *B (a minor) v Director of Public Prosecutions* (2000) 1 All E.R. 833, the House of Lords again considered the issue of absolute liability offences and examined the authorities I have referred to. Their Lordships said nothing that modified the test or approach taken by the previous courts and as summarized by the Privy Council in *Gammon (Hong Kong) Ltd. (supra)*.
12. I adopt and apply the principles set out by the Privy Counsel in, *Lim Chin Aik (supra)* at pages 174 and 175, and *Gammon (Hong Kong) Ltd. (supra)* at page 14, and by the House of Lords in *Sweet v. Parsley (supra)* particularly Lord Diplock at page 363. In applying those principles to the present case I conclude as follows:
13. There is a presumption of law that the Crown must prove *mens rea* before the defendant's can be convicted under either sections 3(2) or 7 of the *Health Insurance Law*.
14. Such a presumption is stronger when the offence is truly criminal in nature. In this case I would not consider the offence as “truly criminal” in nature. The offences created are more related to public welfare or regulation than what lawyers or society traditionally consider criminal activity. The social stigma of a conviction for the present offences is less than traditional “criminal convictions”. There is no provision for imprisonment contained in the present legislation. Although, I conclude that the presumption that *mens rea* is a requirement, the presumption is

not as strong as it would be, if the offences charged in this case were “truly criminal”.

15. The presumption that *mens rea* is required, can only be displaced with clear statutory language or if it is by necessary implication, the effect of the statute. The statutory language in the present case does not clearly remove the presumption that *mens rea* must be proved. Can that presumption, however, be displaced by the necessary inference from the legislation itself, that the legislature intended such conduct to be carried out under conditions of strict liability?

16. The only situation in which the presumption can be displaced is where the statute in question deals with an issue of social concern. Health insurance is clearly such an issue. The requirement that employers must place a standard form of health insurance for every employee is extremely important to all employees and their families. Health insurance is vital if the person faces serious injury or illness. The cost of health care could be crippling and failure to have health insurance could be life threatening. The problem of employers not placing health insurance for employees is a serious one. It is also too common in the Cayman Islands. Employees and their families should not be placed in a situation where they do not have essential health care insurance because the consequences are potentially so extremely serious. It is also important that employers deduct from employees wages only the amount they are entitled to deduct and that amounts so deducted for health insurance premiums be paid to insurers to place health coverage. In the present case, premiums were deducted from the employees salary and instead of

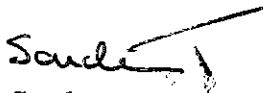
being remitted to the insurer, they were simply kept by the employer. Employers must be accountable and responsible for ensuring that only proper deductions are made and then remitted for their employee's insurance coverage.

17. Finally, even though the legislation in question is concerned with the very important social issue of health care insurance, the presumption of *mens rea* will still stand unless it is shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to comply with the legislation. Imposing strict liability will clearly encourage employers to ensure their employees have basic health care insurance. The employer has an obligation to provide basic health care insurance. The employer must face the consequences if he fails to meet that obligation. It would be very undesirable for an employer to avoid liability by saying he did not intentionally fail to effect and continue health insurance or that it was not effected through mistake or inadvertence of another employee.
18. Clearly, the best way of ensuring employers effect health care insurance and only make proper deductions, is to hold them absolutely liable when such insurance is not effected or continued, or improper deductions are made. It is the duty of every employer to ensure that health care insurance is in place for its employees and to only make proper deductions from the employees salary. The imposition of strict liability is the most effective way of insuring compliance by employers. It does not result in prosecution of a class of persons whose conduct could not in any way

affect the observance of the law. Rather it would prosecute only those who are primarily responsible for insuring compliance with this legislation.

19. For those reasons I conclude that sections 3(2) and section 7 are absolute, or strict liability offences.

Dated this 31st day of October, 2007



Sanderson, J.
Judge of the Grand Court

